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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SOUTH FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., *et al.*,
Petitioners,

v.

METROPOLITAN DADE COUNTY, FLORIDA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DAVID V. KORNREICH
(Counsel of Record)
GORDON D. ROGERS
MULLER, MINTZ, KORNREICH, CALDWELL, CASEY, CROSLAND & BRAMNICK, P.A.
Suite 1800
Two South Biscayne Blvd.
Miami, Florida 33131
(305) 358-5500
Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

The Petitioners will address the following questions:

1. Whether a county government has the authority and competence to make findings of constitutional and statutory violations necessary to justify enactment of a race conscious ordinance which authorizes it to set aside any (and every) county construction contract for bidding exclusively by black prime contractors and to impose unlimited black subcontractor utilization goals on any construction project for an unlimited period of time.

2. Whether, consistent with the equal protection clause of the Fourteenth Amendment, a county government can rely upon studies showing "societal discrimination" against blacks (*e.g.*, lack of education or financing) and assume the existence of past racial discrimination in its contracting practices where the level of participation by black businesses in county contracts is equal to or above the percentage of local black contractors but significantly below the percentage of the county's overall black population.

3. Assuming a county government has the requisite authority and competence and makes the necessary findings of discrimination, may the county promulgate a race conscious program of unlimited black contractor goals and 100% set-asides which, facially, contains no numerical target figure, has no expiration date and does not limit eligibility for preferential treatment to local black contractors but rather encourages and permits "windfall" participation by established black contractors from throughout the United States.

4. Whether Dade County's application of its race conscious ordinance to set aside the Earlington Heights Metrorail Station project for bidding exclusively by black prime contractors and to additionally impose a 50% black

subcontractor participation goal constitutes a violation of the equal protection clause of the Fourteenth Amendment.*

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* *PARTIES BELOW*: Plaintiffs below were: the South Florida Chapter of the Associated General Contractors of America, Inc.; the Engineering Contractors Association of South Florida, Inc.; and the Air Conditioning, Refrigeration, Heating and Piping Association, Inc. a/k/a Mechanical Contractors Association of South Florida.

Defendants below were: Metropolitan Dade County, Florida; Dade County Commission members, Barbara M. Carey, Clara Oesterle, Beverly B. Phillips, James F. Redford, Jr., Harvey Ruvin, Barry D. Schreiber, Ruth Shack, Jorge E. Valdes, and Stephen P. Clark; County Manager Merrett R. Stierheim; and County Transportation Coordinator Warren J. Higgins. Thacker Construction Co., Alfred Lloyd and Sons, Inc., and the Allied Contractors Association, Inc., were permitted to intervene below as additional defendants but did not participate in subsequent appellate proceedings and are believed by petitioner to have no further interest in the outcome of this petition.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 723 F.2d 846 (11th Cir. 1984) and is reproduced in the separate Appendix to this Petition at Appendix A. The opinion of the United States District Court, Southern District of Florida, is reported at 552 F.Supp. 909 (S.D. Fla. 1982) and is reproduced at Appendix B. The Declaratory Judgment and Permanent Injunction entered by the District Court is reproduced at Appendix B at 114a-115a.[1]

JURISDICTION

The Eleventh Circuit Court of Appeals issued its opinion on January 27, 1984. Petitioners' Suggestion for Re-

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[1] References to the separate Appendix submitted with this petition will be designated as [App. —— at page number]. References to the record in the appellate proceedings below will be designated as [R. Vol. No. ——, page number]. Exhibits received in the trial court will be identified by plaintiffs' or defendants' exhibit numbers.

hearing *En Banc* was denied by order dated March 22, 1984 [App. A at 36a]. A stay of the issuance of the mandate pending petition for writ of certiorari was granted through and including May 21, 1984 [App. A at 40a]. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED[2]

Sections 1 and 5 of the Fourteenth Amendment to the United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> * * * *
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> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

At issue in this case is the constitutionality of a Metropolitan Dade County ordinance and various implementing

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[2] The race conscious resolutions, ordinances and administrative regulations of Metropolitan Dade County, Florida, pertinent to this case are reproduced in full in the appendices to the Circuit and District Court opinions. They are: Resolutions No. R-1672-81 (November 3, 1981) [App. A at 21a-23a]; Ordinance No. 82-67 (July 20, 1982) (the "race conscious" ordinance) [App. A at 23a-27a]; Regulations Governing Bid Procedures Under Ordinance No. 82-67 [App. A at 27a-31a]; and Resolution No. R-1350-82 (October 5, 1982) (setting aside the Metrorail Earlington Heights contract for bidding by black prime contractors only and additionally establishing a 50% black subcontractor goal) [App. A at 31a-33a].

resolutions and administrative regulations collectively referred to as the "race conscious ordinance." [3] This local ordinance authorizes the County to set aside construction contracts for bidding exclusively by black contractors and to establish unlimited black subcontractor goals on any County contract.

The race conscious ordinance challenged by Petitioners applies to all County contracts, including federally assisted projects already having minority subcontracting requirements and contracts financed solely through County funds [App. B at 61a]. It contains no express numerical goal or target figure, has no expiration date, and is intended as a permanent part of Dade County's contracting program. Each and every County construction contract must be reviewed under the ordinance to determine whether the contract should be set aside or competitively bid subject to black subcontractor goals, or both [App. B at 61a-68a].

The only express limitation upon the County's discretionary authority under the ordinance to set aside any contract or to establish any level of black subcontractor goals is the availability of sufficient numbers of black-owned firms capable of performing necessary work. Because there are no Dade County black contractors qualified to perform major construction projects, the County measures availability on a national scale. Dade County employees actively solicit and recruit established black-

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[3] Metropolitan Dade County Ordiance No. 82-67 (July 20, 1982) (the race conscious ordinance) is reprinted in full in the Appendix to the Eleventh Circuit's decision appended hereto in App. A to 23a-27a. Adoption of the race conscious ordinance was preceded by a 1981 resolution, R-1672-81 (November 3, 1981) directing the County Manager to develop programs to maximize black participation in County contracts, appended hereto in App. A at 21a-23a. Administrative regulations promulgated to implement the set-aside and goal provisions are included in App. A at 27a-31a. Resolution No. R-1350-82 (October 5, 1982) mandating the 100% black set-aside and 50% black subcontractor goal on the Earlington Heights Metrorail Station contract is reprinted in App. A at 31a-33a.

owned construction firms from outside Dade County and the State of Florida to open places of business in the County (even a post office box or residence address) in order to qualify for preferential treatment under the set-aside and goal programs [App. B at 96a-98a, n. 39].

There is no procedure under the ordinance whereby adversely affected white or non-black minority contractors can seek a waiver of the County's determination that a particular contract is to be set aside for black contractors [App. B at 101a, 105a, n. 49]. Nor is there any procedure whereby adversely affected non-black subcontractors can challenge unjust subcontractor participation or a County determination setting black subcontractor goals. A general contractor unable to meet black subcontractor goals can seek a waiver based upon good faith compliance efforts [App. B at 105a].

I. Procedural Background

Petitioners, plaintiffs/cross-appellants below, are construction industry trade associations comprised primarily of white and non-black minority prime contractors and subcontractors which regulary perform work on construction projects of Metropolitan Dade County, Florida [App. B at 45a-46a]. Petitioners (hereinafter the "Trade Associations") initiated this action challenging the constitutionality of the race conscious ordinance in November, 1982, pursuant to 28 U.S.C. § 1343. Declaratory and injunctive relief were sought under 42 U.S.C. §§ 1981 and 1983 and 28 U.S.C. §§ 2201 and 2202. Also challenged [4] was the constitutionality of Dade County's initial application of the ordinance to set aside the six million dollar Earlington Heights Metrorail Station contract for bidding

[4] The Trade Associations also challenged the County's authority to waive open competitive bidding under Florida law pursuant to the District Court's pendent jurisdiction. Although there is no Florida case precisely on point, the District Court held that the County could waive competitive bidding requirements for any purpose it felt was "in the best interests of the County" [App. B at 80a].

exclusively by black prime contractors and the imposition, in addition to the set-aside, of a 50% black subcontractor participation goal [App. B at 34a-44a].

After hearing, the District Court temporarily enjoined award of the Earlington Heights contract and set the matter for trial on an expedited basis [App. B at 44a]. Following a full day's trial on the merits, the District Court invalidated as unconstitutional the set-aside provisions of the ordinance, both facially and as applied, primarily because they contained no waiver provision and because the County's asserted intention of terminating the program once the percentage of construction contracts awarded to blacks mirrored the County's black population made the racial preference essentially permanent in nature [App. B at 96a-102a]. In contrast, the District Court upheld the goals provisions and their application because they contained a waiver provision and because the 50% goal was not unreasonable "in light of the racial realities that presently exist in Dade County" [App. B at 102a-110a].

The United States Court of Appeals for the Eleventh Circuit reversed, holding the set-aside and goals provisions constitutional, both facially and as applied to the Earlington Heights contract. The appellate court based this conclusion primarily on its view that the County's establishment of a three-tiered system for reviewing racially exclusionary contracts[5] and the annual reassessment of the program required by the ordinance established adequate procedural safeguards to ensure that the racial preferences were limited to their remedial purposes. The ab-

[5] Racial goals and set-asides for particular contracts must be approved by the County Manager, the County's Contract Review Committee made up of County employees, and the Board of County Commissioners. The criteria for approval are the availability of black contractors, the racial goals of the particular County department awarding the contract and, in the case of a set-aside, the Board's determination that such action would be in the best interests of the County [App. A at 13a-15a].

sense of any overall goal, duration limit and set-aside waiver provision and the availability of less discriminatory alternatives were held not to invalidate the County's program [App. A at 14a-16a]. Also, the absolute set-aside for black contractors on the Earlington Heights project was not excessive, in the court's view, because the contract constituted only 1% of the County's annual contractual expenditures [App. A at 17a-19a]. Finally, the court cautioned that its "conclusions on the adequacy of the program's safeguards are premised on the assumption that the review process . . . will be conducted in a thorough and substantive manner" [App. A at 15a-16a].

The evidence presented at trial of the findings and conclusions relied upon by the County in enacting and applying the race conscious ordinance is of the utmost importance in reviewing the County's justification for its racial preference program and the scope of the remedy selected. After careful consideration of these facts the District Court determined that although the County's findings were sufficient to allow some form of race conscious remedy,[6] they were insufficient to justify the overly broad scope and duration of the set-aside provisions of the ordinance. The Eleventh Circuit disagreed and reversed. The following summary is provided to enable this Court to understand the circumstances under which the ordinance was enacted and first applied.

II. Factual Background of the Race Conscious Ordinance

Race riots occurred in Miami's Liberty City area in May, 1980. Reports generated by various studies and

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[6] The District Court acknowledged that societal discrimination was the probable cause of the low number of black construction firms in the County but still found what it felt was "identified discrimination" sufficient to warrant race conscious remedies. The Court relied upon the history of race discrimination in the construction industry nationally, the low number of black construction firms compared to the black population, and the correspondingly low number of County contracts awarded to blacks to conclude that black firms were suffering the "present effects of past discrimination" [App. B at 75a-76a].

investigations[7] into the underlying causes primarily attributed the civil disturbances to the continuing effects of past "societal discrimination" (*e.g.*, poverty, unemployment, inadequate housing, the failings of the criminal justice and educational systems, etc.) [App. B at 50a-53a, 75a].

In relation to the construction industry, statistical investigations based upon 1977 census data[8] established that black contractors and subcontractors comprised approximately 1% of all construction firms in the Dade County area; whereas, black citizens constituted approximately 17% of the County's population [App. B at 49a-50a]. A study conducted by an in-house County group estimated that black contractors had been awarded 1.4% of the dollar value of all *non-federally assisted* County construction contracts in the years 1977-1980. The County group deliberately did not include in its study any construction contract involving federal funding "because we knew there were already guidelines and criteria under federal contracts for minority businesses" [R. Vol. 5 at pp. 356-357, 377-378].

Another study—the "Janus Report,"[9] focused more directly upon the economic situation in the black community of Dade County, finding that black businesses generally lagged far behind white and hispanic business

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[7] "Report of the Governor's Dade County Citizens Committee" (October 30, 1980) [Def. Comp. Ex. No. 6(4)(c)]; Report of the United States Commission on Civil Rights "Confronting Racial Isolation in Miami," (June, 1982) [Def. Comp. Ex. No. 6(7)].

[8] The reports referred to were "Black Business Disparity Study," prepared by the Metropolitan Dade County Disparity Study Group Task Force (October 27, 1981) [Def. Comp. Ex. Nos. 6(2) and (3)]; and "Black-Owned Businesses in Metropolitan Miami, A Statistical Analysis of U.S. Census Data" prepared by Tony E. Crapp, Sr. (December, 1980) [Def. Comp. Ex. No. 6(4)(a)].

[9] "An Economic Adjustment Plan for the Civil Disturbance Areas of the City of Miami and Dade County," prepared by Janus Associates (May, 1981) [Def. Comp. Ex. No. 6(4)(b)].

development. This economic condition was attributed to the black community's lack of the tools of development necessary for economic growth, including lack of capital and minimal entrepreneurial development. The report warned that the black community remained explosively volatile due to its perception that blacks had not shared equitably in the economic growth of the County. It recommended, *inter alia*, development of affirmative action and set-aside programs to maximize the opportunities of black-owned businesses in the public sector [App. B at 51a-53a].

A. *The "Race Conscious" Resolution*

On November 3, 1981, the Dade County Commission relied upon the above reports in adopting Resolution No. R-1672-81.[10] The Commission attributed the disparity between the number of black-owned businesses in the County (1%) and the County's black population (17%) and the correspondingly low percentage of County construction contracts awarded to black firms to "the long-standing existence and maintenance of barriers impairing access by black enterprises to contracting opportunities" [App. A at 22a]. Neither the studies nor the resolution identified any specific artificial barriers or past discrimination against black construction contractors [App. B at 74a-77a]. The resolution sought to remedy past discrimination by directing development and implementation of County-wide programs, "*including specific race conscious measures*," to maximize the number of County contracts awarded to the black business community.

B. *Pre-Ordinance Race Conscious Efforts to Increase Black Participation in County Construction Contracts*

Dade County's major construction activity from 1979 through November, 1982 was the billion dollar "Metrorail" mass transit system, financed through federal grants from the Urban Mass Transportation Administration

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[10] Reprinted in App. A at 21a-23a.

("UMTA") along with state and local funds. Pursuant to UMTA grant conditions,[11] the County was required to and did establish an overall minority business enterprise (MBE) participation goal of 16.5% of the total dollar value of all Metrorail and related contracts.

As the phases of Metrorail construction progressed, MBE participation goals escalated from approximately 5% on early procurement contracts to 20-25% on line section construction contracts and eventually, to 40-45% on station construction contracts. As of September 30, 1982, County MBE and minority employment programs had achieved results which exceeded federal guidelines. MBE contractors and subcontractors received more than 20% of the dollar value of all work performed on the Metrorail project, including approximately 7% awarded to black-owned firms. Of the sixteen (1,600) hundred workers employed in the Metrorail construction on September 30, 1982, 53% were minorities, including 36% black employees (black workers comprise only 22% of the County's construction or blue collar work force) [App. B at 57a].

Black contractor participation in the Metrorail project as of 1982 had not been limited to subcontractors. Thacker Construction Co., an experienced, well-financed black prime contractor from Illinois was specifically recruited by the County to engage in competitive negotiations for the construction of the Metrorail North Bus Maintenance Facility project. Thacker was awarded the contract on this project in the amount of ten to eleven million dollars [R. Vol. 5, pp. 173, 195-196, 213-214; App. B at 48a].

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[11] United States Department of Transportation Minority Business Enterprise Regulations, 49 C.F.R. Part 23, define minority businesses as those owned and controlled by blacks, hispanics and other racial and ethnic groups.

C. *Pre-Ordinance Efforts to Award the Earlington Heights Contract to a Black Prime Contractor*

The Earlington Heights Station, located within a black neighborhood, was the last of the twenty (20) Metrorail stations to be built. Although originally scheduled to be bid as part of a five (5) station package, the station was established as a separate contract to be awarded through the same "competitive negotiation" procedures which previously resulted in award of a Metrorail prime contract to a black contractor [App. B at 57a]. Newspaper reports characterized this action as a commitment to the black community that the station would be awarded to a black contractor [Pl. Ex. Nos. 6-9].

At the time it recommended separate competitive negotiation of the Earlington Heights contract, the County's Transit Oversight Committee, which included between four (4) and six (6) County Commissioners, was fully aware that there were no Dade County black prime contractors which could qualify for the project [App. B at 77a; Pl. Ex. 23 at p. 5].

On July 21, 1982 (one day after the County adopted the race conscious ordiance) proposals were received on the Earlington Heights Station contract. A non-black prime contractor tendered the lowest price, which was more than two (2) million dollars lower than the next lowest offer proposed by a black prime contractor. No other proposals were received by the County [App. B at 68a-71a].

D. *The Adoption of the Race Conscious Ordinance*

On July 20, 1982 (one day before receipt of the original proposals for competitive negotiation of the Earlington Heights contract), the County adopted its race conscious ordinance and implementing regulations. The County Commission subsequently accepted the County Manager's recommendation that all proposals received on the Earlington Heights contract be rejected and that the

contract be re-bid under the terms of the newly adopted race conscious ordinance [App. B at 71a].

After review pursuant to the administrative regulations, the County Manager and the County's in-house Contract Review Committee (CRC) concluded that because at least three (3) black prime contractors were available, the Earlington Heights contract should be set aside for competitive bidding exclusively among black contractors. They also recommended, based upon black subcontractor availability, an additional 50% black subcontractor goal. As the final tier in the three steps review process, the County Commission adopted Resolution No. R-1350-82 on October 5, 1982, finding that waiver of open competitive bidding was "in the best interests of the County" and directing implementation of the set-aside and goal recommendations [App. B at 71a].

On November 17, 1982, two (2) bids were received on the Earlington Heights Station contract from black prime contractors. The unopened bid packages were placed in the custody of the District Court pursuant to the temporary restraining order and were subsequently returned unopened to the two bidders [App. B at 74a].

REASONS FOR GRANTING THE WRIT

The decision below upholds the constitutionality of a Dade County ordinance which allows the County to set aside any County construction contract for black prime contractors only and to establish unlimited black subcontractor goals on any County construction contract for an indefinite period of time. Established black-owned construction firms from throughout the United States which were never disadvantaged by the County's contracting practices qualify for windfall preferential treatment under the ordinance at the expense of local black and non-black contractors. Although not specified in the legislation, the courts below accepted unwritten assurances of local officials that the program will remain in effect only

until the percentage of contracts awarded to black firms equals the percentage of blacks in the local population. The guarantee of equal protection of the law has thus been suspended in Dade County for an indeterminate period of years or decades with the full approval of the Eleventh Circuit Court of Appeals.

The Trade Associations submit that the local race conscious legislation at issue in this case goes far beyond the one year, 10% minority subcontractor goal approved in this Court's opinions in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The fact that the Dade County program approved below has all of the faults and none of the safeguards relied upon in upholding the Congressional enactment should compel an end to this Court's four year silence regarding the scope of the constitutionally permissible race conscious legislation. Failure to grant review will allow the decision below to serve as precedent before lower courts and local governments alike for the proposition that any city or county having simple municiple legislative authority is now free to pursue its own peculiar ideas of social (or political) engineering to remedy perceived disparate treatment of any racial or ethnic group.[12]

The Trade Associations thus submit that the Eleventh Circuit Court of Appeals has decided an extremely important issue of federal constitutional law in a way which conflicts with the intent of the Court as expressed in *Fullilove, supra.* Further, because the decision below is attributable in large measure to the confusion which prevails in the judicial and legislative branches of government regarding the standards to be derived from *Fullilove, supra,* and *Regents of the University of California*

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[12] As was noted by Justice Stevens in his dissent in *Fullilove, supra,* the quota concept is not limited to the area of public contracting, but could as well be logically extended to apply "in the electoral context [to] support a rule requiring that at least 10% of the candidates elected to the legislature be members of specified racial minorities," 448 U.S. 547 (Stevens, J., dissenting).

v. Bakke, 438 U.S. 265 (1978) the writ should be granted to allow the Court to settle the important questions of federal law presented herein.

I. THE JUDGMENT BELOW SHOULD BE REVIEWED BECAUSE THE LOWER COURT SUBSTANTIALLY DEPARTED FROM THE STANDARDS OF *FULLILOVE, SUPRA,* BY HOLDING THAT A LOCAL GOVERNMENT RACE CONSCIOUS PROGRAM INVOLVING 100% BLACK PRIME CONTRACTOR SET-ASIDES AND UNLIMITED BLACK SUBCONTRACTOR GOALS WAS JUSTIFIED BY PRESUMPTIONS OF PAST DISCRIMINATION AND SELECTIVE RELIANCE UPON A STATISTICAL DISPARITY BETWEEN THE PERCENTAGE OF LOCAL BLACK CONTRACTORS AND THE LOCAL BLACK POPULATION.

In their respective opinions below, both the District and Circuit Courts complained of the lack of clear standards under which to review Dade County's race conscious ordinance [App. A at 7a-8a; App. B at 82a, 90a-92a]. The District Court relied primarily upon the standards enumerated in Justice Powell's concurring opinion in *Fullilove, supra,* in holding that local government race conscious programs must be strictly scrutinized.[13]

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[13] Numerous court decisions and law review commentaries issued since this Court's decisions in *Fullilove* and *Bakke, supra,* have also noted the dire need for additional guidance on this extremely important issue of federal law. But a few examples are: Van Benthuysen, Minority Business Enterprise Set Aside; The Reverse Discrimination Challenge, 45 Alb. L. Rev. 1139, 1176 (1981); Lavinski, The Affirmative Action Trilogy and Benign Racial Classification—Evolving Law in Need of Standards, 27 Wayne L. Rev. 1 (1980); Richards, Equal Protection and Racial Quotas: Where Does *Fullilove v. Klutznick* Leave Us?, 33 Baylor L. Rev. 601 (1981); *Schmidt v. Oakland Unified School District*, 662 F.2d 550, 556 (9th Cir. 1981) (holding a school board competent to make findings and upholding minority contractor goals based upon disparities between the number of local minority contractors and the general population), *vacated on other grounds*, 457 U.S. 594 (1982); *M.C. West,*

It noted, however, that other courts had applied less stringent criteria in similar situations [App. B at 91a-92a].

The Eleventh Circuit rejected this approach, observing that "[i]n light of the diversity of views on the Supreme Court, determining what 'test' will eventually emerge from the Court is highly speculative" [App. A at 10a]. Based upon this lack of guidance, the appellate court felt free to develop a hybrid standard grounded upon what it perceived as the factors common to all of the diverse views expressed in *Fullilove, supra.* Judge Kravitch, writing for the Eleventh Circuit panel, expressed the view that there was no clear "plurality" or controlling opinion in *Fullilove* [App. A at 8a, n.7].

As shown by the decision below, the broad standard of review adopted by the Eleventh Circuit essentially requires less of a showing of compelling interest and fewer built-in safeguards for local government programs than this Court did of Congress, providing for consideration of only three broadly stated factors:

> (1) that the governmental body have the authority to pass such legislation; (2) that adequate findings have been made to ensure that the governmental body is *remedying* the present effects of past discrimination rather than advancing one racial or ethnic group's interest over another; and (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination. [App. A at 10a (emphasis in original)].

Inc. v. Lewis, 522 F.Supp. 338, 342 (M.D. Tenn. 1981); *United States v. City of Miami*, 614 F.2d 1322, 1377 (5th Cir. 1980); *rev'd on rehearing*, 664 F.2d 435 (1981) (en banc); *Williams v. City of New Orleans*, 694 F.2d 987 (5th Cir. 1982), *rev'd on rehearing*, —— F.2d ——, 34 Fair Empl. Prac. Cas. (BNA) 1009 (April 23, 1984) (en banc); *Bratton v. City of Detroit*, 704 F.2d 878, 885 (6th Cir. 1983), *reh. denied*, 712 F.2d 222 (1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 703 (1984).

Although framed as a three-step process, the Eleventh Circuit's review criteria essentially eliminates meaningful inquiry into the authority and competence of local government units to make findings of statutory and constitutional violations by holding that such questions are determined based upon state law.[14] The lower courts concluded that the simplest municipal legislative powers were sufficient to confer the requisite authority and competence. Thousands or tens of thousands of similarly empowered city and county governments throughout the nation have therefore been held to possess the necessary authority to enact similar race conscious legislation.

The analytical framework adopted by the lower court is thus reduced to a two step test limited to the adequacy of the findings and the scope of the remedy selected. Proper application of even these overly broad standards would have required invalidation of the entire race conscious ordinance in this case because the findings relied upon by the County were inadequate to show a need for *additional* remedial measures above and beyond those already in place. Further, as discussed *infra*, the scope of the remedy selected by the County substantially exceeds the stated objective of eliminating the present effects of past discrimination against Dade County black contractors.

The problem in this case is that the lower courts failed to recognize any difference between the "paramount" powers of Congress and the authority of purely local gov-

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[14] Significantly, the question of the authority of a local government to make legal and factual findings of constitutional and statutory violations and to enact remedial legislation must be determined, in the Eleventh Circuit's view, solely under state law [App. A at 11a-12a]. Under this Court's recent decision in *Pennhurst State School & Hospital v. Haldeman*, —— U.S. ——, 52 U.S.L.W. 4155 (January 23, 1984), federal courts may thus be deprived of jurisdiction to determine the issues of local authority and competence.

ernments in the area of race conscious remedial legislation. The various opinions in *Fullilove, supra,* clearly hold that Congress need not develop as detailed a legislative record in enacting a race conscious remedy as might be required of a court or administrative agency. However, as noted by Justice Powell in his concurring opinion in *Fullilove, supra,* the fact that a congressional set-aside was upheld based upon a minimal legislative record did not mean "that the selection of a set-aside by any other governmental body would be constitutional. *See Bakke,* 438 U.S. at 309-310. The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body." *Fullilove, supra,* 448 U.S. at 515-516, n.14 (concurring opinion of Powell, J.).

In *Bakke, supra,* this Court dealt with what is possibly the lowest level of government, an appointed board; whereas, *Fullilove* involved review at the opposite end of the spectrum of an act of Congress. The Eleventh Circuit, relying upon *Ohio Contractors Association v. Keip,* 713 F.2d 167 (6th Cir. 1983), concluded that this Court did not mean that all intermediate governmental units were incompetent and therefore powerless to redress past discrimination. However, it entirely disregarded this Court's clear instruction that the applicable standard for review of race conscious legislation must become increasingly strict as one travels down the overall scale of governmental authority. Where the governmental body involved, as in this case, is a municipal legislative body on the low end of the scale, the findings upon which a race conscious remedial program is premised and the scope of remedy selected must be subjected to substantially stricter scrutiny than would be applied to an act of Congress.

The lower courts herein accepted the arguable proposition that any local government having simple municipal legislative powers can make findings and fashion a legis-

lative remedy which confers or takes away benefits or opportunities based solely upon race. This conclusion obviously affects every city and county government in the nation.

In view of the thousands of legislative bodies now authorized to enact race conscious schemes, the only conceivable means of enforcing the guarantee of equal protection of the law is to insist upon adherence by lower courts to the requirement that local government race conscious programs meet the strictest possible constitutional tests. Findings of past racial discrimination must show substantially more than mere disadvantage based upon societal discrimination. Built-in safeguards equal to or greater than those required of Congress in *Fullilove, supra,* cannot simply be promised by local officials or implied by the courts, but must appear on the face of the legislative enactment in order to ensure that local race conscious programs cannot be arbitrarily extended beyond their stated remedial objectives. The overly discretionary review criteria erroneously adopted and applied by the lower court does not accomplish this objective and should be rejected by this Court.

A. The Lower Court Improperly Concluded That Mere Disparity Between The Percentage Of Blacks In A Particular Profession Or Occupation And The Percentage Of Blacks In The County Population Was Sufficient Justification For The County's Race Conscious Set-Aside And Goal Programs.

The lower court held that a constitutionally permissible local race conscious program must be predicated upon findings adequate to "ensure that the governmental body is *remedying* the present effects of past discrimination rather than advancing one racial or ethnic group's interests over another" [App. A at 10a]. Such findings form the basis from which the courts can determine (1) whether statutory or constitutional violations have actually occurred in order to evaluate the need for the race

conscious measure, and (2) whether the remedy selected is narrowly tailored to the identified problem.

The Eleventh Circuit, having broadly stated the rule in this case chose instead to accept without analysis or discussion the District Court's conclusion that "identified discrimination" was shown by the history of race discrimination in the construction industry nationally and the disparity between Dade County's percentage of black contractors and black population.[15] These findings were held sufficient to justify the entire race conscious program, both facially and as applied.

The Trade Associations emphatically submit that mere disparities between a local racial or ethnic population and the percentage of members of each group in a particular trade or profession can never be accepted by the courts as "identified discrimination" sufficient by itself to warrant local race conscious legislation. Although black citizens may comprise 17% of the County population, it is highly doubtful that the percentage of black doctors, florists, gas station operators or any other trades mirror the population. That such disparities may exist does not prove that race discrimination is their underlying cause.

The term "identified discrimination" as used in *Bakke, supra*, and in Justice Powell's concurring opinion in *Fullilove, supra*, relates to factual and legal findings of actual constitutional or statutory violations [*Bakke, supra*, 438 U.S. at 307; *Fullilove, supra*, 448 U.S. at 498 (Powell, J., concurring)]. In this case, however, the District Court admitted that the evidence at trial did not establish any specific discrimination against black contractors

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[15] The District Court rejected the Trade Association's contention that the proper benchmark required comparison of the percentage of qualified Dade County black contractors (*i.e.*, the work force) and the percentage of County contracts awarded to black firms. It noted that this Court had permitted Congress to rely upon population comparisons in *Fullilove, supra* [App. B at 106a, n.50].

by either the County or non-black contractors. No study relied upon by the County identified any *artificial* barrier in the County's contracting practices. Those barriers which were identified (*i.e.*, inadequate capital, lack of experience and bonding capacity, etc.) related to the actual *qualifications* demanded of all public contractors in order to protect the public.[16]

Notwithstanding these conclusions, the courts below found that the disparity between the percentage of black construction firms in Dade County (1%) and the percentage of black citizens in the County population (17%), coupled with the "negligible" percentage of County construction contracts awarded to black contractors (1.4%) was evidence of "identified discrimination" sufficient to ensure that the County was remedying the present effects of past discrimination. No precedent was or could be cited for this conclusion apart from this Court's approval of congressional population comparisons in *Fullilove, supra.*

Identified discrimination, in the context of *Fullilove* and *Bakke, supra,* must be limited to its plain meaning and cannot be transformed by local governments or the courts into a term of art. True "identified discrimination" might have been shown by proof of racially discriminatory County licensing examinations or artificial barriers in qualifying to compete for County contracts. Likewise, proof of discriminatory refusal by non-black contractors to subcontract work to black-owned firms might justify a race conscious remedy *but there is no such evidence in this case.*

The "unique" powers of Congress might require this Court to defer to broad congressional assumptions re-

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[16] *See, e.g.*, Section 255.05, Florida Statutes (1981), requiring contractors on public construction projects to obtain payment and performance bonds on all contracts over $25,000.00. Chapter 82-196, Laws of Florida (1982), increased the discretionary threshold amount to $100,000.00.

lated to population disparities. Similar judicial laxity in reviewing the findings asserted in support of a local government race conscious legislation cannot be permitted. Findings of racial or ethnic disparities similar to those held sufficient in this case could be easily and selectively compiled by any local government in order to justify otherwise unwarranted preferential treatment of any group.

The Eleventh Circuit's interpretation of *Fullilove, supra*, as authorizing local governments, rather than Congress alone, to enact remedial legislation based upon broad and inconclusive disparity evidence must be rejected. Any other action by this Court will encourage and permit unprecedented social (and political) engineering by local governments through racial or ethnic quotas. Local legislation purportedly compelled by the need to advance one racial or ethnic group to its rightful population percentage in a particular trade or vocation would necessarily be followed by new legislation to correct the disparity created by the prior program, *ad infinitum*. The final result would be to permit the cyclical infliction of the most egregious constitutional injuries under the guise of remedial relief.[17]

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[17] Hispanics were engaged in the construction business in numbers six times greater than the number of black-owned construction companies and comprised 41% of the County's population. Hispanics are also among the disadvantaged minorities recognized by federal MBE programs and were one of the groups found to have suffered discrimination in *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974). Accordingly, under this criteria the County could justify setting aside construction contracts until Hispanic contractors received their rightful share equal to local population statistics. The concept could also be applied to County Commission seats, jury pools, County employment and other opportunities. The County's decision not to rely upon disparity statistics to aid Hispanic construction business development shows the blatant inadequacy of the data relied upon to establish a compelling need to assist black contractors.

In this case, population disparity evidence was the sole basis, apart from presumptions of national employment discrimination, relied upon by the lower court as justification for the County's race conscious ordinance. Accordingly, the court erred in concluding that the findings relied upon by the County provided a sufficient predicate for race conscious remedial action.

B. Even If The County's Findings Were Sufficient To Justify Some Form Of Race Conscious Remedial Action, They Were Insufficient To Ensure That The County Was *Remedying* Past Discrimination In View Of The Other Race Conscious Measures Already In Effect.

Review of the findings made by a governmental unit in support of a remedial race conscious program requires two essential tests. First, as noted above, the findings must identify an actual problem resulting from constitutional or statutory violations related to racial discrimination. Second, the findings must establish a compelling governmental need to enact a remedy for the *present* effects of such past discrimination.

In this case, even if the disparity statistics and the history of past employment discrimination in the construction industry nationally provided sufficient justification for some form of race conscious remedial action, there was no showing of a compelling need for County race conscious measures in addition to other measures already in effect, at the time the ordinance was enacted.

The District Court concluded that disparity findings justified the goals provisions of the ordinance but were insufficient to sustain the constitutionality of the *race exclusive* set-aside provisions. It did so in recognition of the fact that the other race conscious programs already in place, including MBE subcontractor goals, the County's ten million dollar bond guarantee program for black contractors, competitive negotiation of prime contracts and other measures had significantly increased the per-

centage of County contracts awarded to black firms prior to adoption of the set-aside program.

The record amply supports the District Court's conclusions. The County asserted a compelling need to enact the ordinance and to set aside the Earlington Heights Station contract to ensure that at least one Metrorail prime contract would be awarded to a black contractor. However, the County had already awarded the multi-million dollar prime contract on the North Bus Maintenance Facility to Thacker Construction Co., a black contractor, prior to enactment of the race conscious ordinance or its application to set aside the Earlington Heights contract. Black subcontractors, which comprised 1% of all Dade County construction firms, had received 7% of the total value of the billion dollar Metrorail project prior to enactment of the ordinance. In short, the system was achieving its intended results without the need for the *race exclusive* set-aside.

The Eleventh Circuit disagreed, holding that the disparity findings justified the goals *and* the set-aside, both facially and as applied. In its view, the fact that "only 7%" of all Metrorail contracts had been awarded to black contractors was further evidence of the need for the set-aside [App. A at 19a, n.14].

The Trade Associations submit that neither court correctly interpreted the weight to be given the disparity evidence in this case in determining the need for the race conscious ordinance at the time of its enactment. A contracting system which results in 1% of available contractors receiving 1.4% of County contracts is precisely (or slightly better than) the result which could be expected in the complete absence of past discrimination.[18]

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[18] Even this assumption is flawed by the County's failure to consider any federally assisted construction contract subject to minority subcontractor participation goals (*e.g.*, the UMTA contracts and Public Works Employment Act of 1977 funds at issue in *Fullilove, supra*) in its study of contracts awarded from 1977-1980 [R. Vol. 5 at pp. 356-357].

As noted by the District Court, a system which results in 1% of available black contractors receiving 7% of available work shows substantial affirmative action. Therefore, even assuming that the disparity justified some form of remedial action, it did not justify any *County* race conscious action in 1982 *in addition to* the federal and local measures already in effect.[19]

There was no compelling need for the extreme set-aside and goals authorized by the race conscious ordinance at the time of its enactment. There was likewise no compelling need to completely exclude non-black prime contractors from the opportunity to bid on the Earlington Heights contract, nor was there a need for the 50% black subcontractor goals. In the absence of such justification, the lower courts erred in failing to hold the entire race conscious ordinance unconstitutional.

II. REVIEW SHOULD BE GRANTED BECAUSE THE LOWER COURT IMPROPERLY DEFERRED TO THE COUNTY IN DETERMINING THAT THE BLACK CONTRACTOR SET-ASIDE AND BLACK SUBCONTRACTOR GOAL PROVISIONS OF THE RACE CONSCIOUS ORDINANCE WERE NARROWLY TAILORED TO THE STATED OBJECTIVE OF ASSISTING DADE COUNTY BLACK CONTRACTORS OVERCOME THE PRESENT EFFECTS OF PAST DISCRIMINATION.

Even if the County had the requisite authority and had made adequate findings of past discrimination against Dade County black citizens, the scope of the remedy selected by the County unreasonably and unneces-

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[19] The original specifications for competitive negotiation of the Earlington Heights contract required not less than 44% minority contractor participation [App. B at 107a-108a]. The County had the option of "taking race into account" by encouraging contractors to comply with the federal MBE goal through utilization of black subcontractors. This method would have complimented the federal requirements while still allowing fulfillment of the County's stated remedial objective.

sarily exceeds the legitimate objective of assisting Dade County black contractors overcome the present effects of past discrimination. Although, *Fullilove, supra,* involved what the Court referred to as a "set-aside," the remedy held there to "press the outer limits of congressional authority" was actually a flexible goal equipped with exhaustive administrative waiver provisions. *Fullilove, supra* at 490. In this case, possibly for the first time, the Court must address a true "set-aside"—a position or opportunity for which whites and non-black minorities need not apply.

The racial discrimination involved in setting aside a particular contract for black firms is effected directly by Dade County. It is not remote, as in *Fullilove, supra,* where government grantees encouraged prime contractors to seek out and utilize a given percentage of minority firms and could grant waivers if good faith efforts did not result in meeting the desired goal. Here, County employees make recommendations and the elected County Commission makes a final decision to set aside a particular contract for black contractors based upon the availability of at least three (3) qualified black firms and "the best interests of the County." There are no waivers and no appeals.[20]

The ordinance contains no target figure, overall goal or other means of determining how many contracts should be set aside or when the program is no longer necessary. Assuming availability, the County could immediately set aside *all* County construction contracts for black contractors only. In the alternative, it could allow the program to linger for decades, setting aside contracts whenever politically expedient.

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[20] This case shows that the County's allegedly exhaustive administrative procedures are plainly inadequate because only two bids were received from black contractors on the Earlington Heights contract.

In summary, the Eleventh Circuit in this case has approved a local government race conscious remedy which the plurality opinion authored by Justice Burger in *Fullilove, supra,* indicates could not be upheld even if enacted by Congress. In so ruling, the Eleventh Circuit "decline[d] to hold the ordinance facially unconstitutional, however, merely on the speculation that the county will not vigorously undertake implementation of the review procedure" [App. A at 16a]. It thus entrusted the constitutional rights of non-black contractors to the discretionary judgment and presumed good faith of County officials by approving an ordinance which authorizes those officials and politicians to violate such rights at will.

The Fourteenth Amendment was specifically intended as a limitation upon the authority of state and local officials to enact racially discriminatory laws. The judgment below negates this protection, suggesting instead that the Constitution allows the federal courts to refuse to invalidate facially unconstitutional local legislation on the grounds that local officials and politicians can be trusted. Such deferral conflicts in all respects with this Court's opinions in *Bakke* and *Fullilove, supra.* Constitutional protections cannot "vary with the ebb and flow of political forces," *Bakke, supra,* at 299.

A. The Set-Aside Provisions Of The Race Conscious Ordinance Intentionally Permit Windfall Participation In The Remedial Racial Preference Program By Out-Of-State Black Firms At The Expense Of Local Black And Non-Black Contractors.

The most egregious constitutional deficiency of Dade County's race conscious remedy is its failure to even attempt to limit preferential treatment to black contractors which have suffered impaired competitive positions based upon past racial discrimination by the County. Instead, the Dade County ordinance creates an irrebuttable presumption that *all* black contractors, including established, well-financed firms from Illinois, Ohio, Pennsylvania, and

Kansas [R. Vol. 5 at pp. 236-239] have been damaged by past racial discrimination and are therefore presently entitled to preferential access to County construction work. The remedy selected is national in scope. Because black contractor set-asides are limited only by availability of black firms and because availability is determined on a national scale, this alleged limitation on the County's authority is entirely illusory. Perpetuation of the remedy will create a sheltered market of windfall racial preferences for black firms never conceivably affected by Dade County contracting practices.

This argument is not intended to imply that otherwise proper remedial race conscious legislation must be limited to "make whole" relief for local black contractors which can document specific incidents of racial discrimination in past years. Narrowly drawn class based relief can be legislatively effected in proper circumstances by Congress, and arguably, by lesser governmental units. However, the class intended to be benefited by local remedial legislation cannot include all black contractors in the nation as it does in this case.

A more disturbing impact of the remedy approved by the Eleventh Circuit is that it defeats its legitimate purpose of assisting local black contractors in overcoming the alleged effects of past discrimination. Although local black firms are eligible to bid on set-aside contracts and contracts subjected to black goals, it is unlikely that truly disadvantaged local firms could compete effectively against otherwise competitive out-of-state firms owned by blacks.

The record below conclusively shows that County employees spent public funds to travel throughout the United States actively soliciting and recruiting established black firms to take advantage of the racial preferences provided by the ordinance. Prior to enacting the ordinance, the County was fully aware that there were

no Dade County black contractors which could qualify for major construction projects. The County therefore could not have intended to benefit local black firms through the set-aside provisions of the ordinance or by setting aside the Earlington Heights contract. The intended beneficiaries of the racial preference were clearly the out-of-state firms recruited to participate in the remedial program. The District Court acknowledged this, observing that apart from symbolism the practice did not "seem to involve any tangible benefits per se for the local Black business community" [App. B at 98a, n.39]. The appellate court did not even mention this deficiency, apparently concluding that a local race conscious program having national remedial objectives was constitutionally permissible.

The remedy established by the County is not narrowly tailored in any respect. As determined by the District Court, the set-aside is merely a provision which prefers one race over another. Accordingly, even if this Court cannot agree upon uniform standards for local race conscious legislation, it should still act to vacate the Eleventh Circuit's decision in this case.

B. The Goals Provisions Are Not Narrowly Tailored To Redress The Present Effects Of Past Discrimination Because They Also Permit Windfall Participation In The Remedial Preference Program By Out-Of-State Subcontractors And Allow Unlimited Black Goals On All County Construction Projects For An Unlimited Period Of Time.

The District Court concluded that the goals provisions of the ordinance suffered from the same constitutional deficiencies as the set-aside [App. B at 104a-106a]. They contain no overall goal, target percentage or durational limit and are thus a permanent part of the County's contracting program. There is no external means of determining when the goals will or should end nor is there any limitation, apart from availability of black subcontrac-

tors, upon the amount of work the County can allocate to black firms. Because availability of subcontractors is also determined on a national scale, the County could immediately set and enforce unreasonable 25%, 50% or 75% black subcontractor goals on all contracts under the ordinance.

In deciding to uphold the goals provisions notwithstanding these deficiencies, the District Court concluded that racial goals are a presumptively permissible means of remedying past discrimination under *Fullilove, supra.* Relying upon this presumption of constitutionality, it held that the actual percentage chosen by the County was purely a matter of discretion. Finally, the District Court pointed to lack of effective alternatives and the waiver provisions applicable to goals as factors allowing sufficient flexibility to distinguish the goals from an impermissible quota.

The lower courts erred in upholding the goals provisions as a narrowly tailored remedy. This Court's opinion in *Fullilove, supra,* do not support any presumption that locally imposed black subcontractor goals are constitutionally permissible. A federal court therefore cannot defer to a local racial goal merely because it can perceive a rational basis for its imposition.

Further, the irrebuttable presumption of disadvantage and entitlement to preferential treatment applies in the case of goals to permit windfall benefits to established out-of-state black subcontractors. Unlike *Fullilove, supra,* there is no procedure whereby a local black or other subcontractor can challenge unjust participation in the program by out-of-state subcontractors not disadvantaged by alleged past discriminatory practices in Dade County.

Finally, reliance by the lower courts upon the unwritten, non-binding promises of local officials that the preference program will end once black subcontractors receive 17% of County contracts is clearly an inadequate substi-

tute for the safeguards required of Congress by this Court in *Fullilove, supra.* The waivers available regarding black subcontractor goals are likewise only illusory protection from arbitrary County action because the County measures availability of black subcontractors on a national scale. In essence, the lower court's decision requires local black and non-black subcontractors to trust in the County not to violate their constitutional rights. The decision should therefore be reversed.

CONSCLUSION

For the foregoing reasons, the Petitioners respectfully request that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Eleventh Circuit in this case.

Respectfully submitted,

DAVID V. KORNREICH
(Counsel of Record)
GORDON D. ROGERS
MULLER, MINTZ, KORNREICH,
CALDWELL, CASEY, CROSLAND
& BRAMNICK, P.A.
Suite 1800
Two South Biscayne Blvd.
Miami, Florida 33131
(305) 358-5500
Attorneys for Petitioners

83 - 1872

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SOUTH FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., *et al.*,
Petitioners,

v.

METROPOLITAN DADE COUNTY, FLORIDA, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DAVID V. KORNREICH
(Counsel of Record)
GORDON D. ROGERS
MULLER, MINTZ, KORNREICH, CALDWELL, CASEY, CROSLAND & BRAMNICK, P.A.
Suite 1800
Two South Biscayne Blvd.
Miami, Florida 33131
(305) 358-5500
Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 83-5001

SOUTH FLORIDA CHAPTER OF THE
ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,
et al.,
Plaintiffs-Appellees, Cross-Appellants,

v.

METROPOLITAN DADE COUNTY, FLORIDA, *et al.*,
Defendants-Appellants, Cross-Appellees.

Jan. 27, 1984

Appeals from the United States District Court
for the Southern District of Florida

Before KRAVITCH, HENDERSON and ANDERSON, Circuit Judges.

KRAVITCH, Circuit Judge:

This case involves the constitutionality of a Metropolitan Dade County ordinance and resolution granting preferential treatment to blacks in its contract bidding process. The ordinance allows the county to "set aside" contracts for bidding solely among black contractors [1] and

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[1] The term "black contractor" as used in the challenged ordinance and throughout our opinion denotes a contracting or subcontracting business entity that is

> at least 51 percentum owned by one or more Blacks, or, in the case of a publicly-owned business, at least 51 percentum of the

contains a "goals" provision by which the county can require that a certain percentage of a contract's value be subcontracted to black contractors. The plaintiffs, non-profit corporations and trade associations, brought suit challenging the ordinance both facially and as applied to the county construction contract for the Earlington Metrorail Station.

The district court held that the "set aside" provision violated the Equal Protection Clause of the Fourteenth Amendment and granted a permanent injunction. The court, however, upheld the constitutionality of the "goals" provision. *South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County*, 552 F.Supp. 909 (S.D.Fla. 1982) [hereinafter cited as *Metro Dade*]. Both sides have appealed from the decision.

I.

The district court made extensive factual findings of the events leading up to the present controversy.[2] The court found that the May 1980 disturbances in Liberty City had prompted the county to investigate the economic and social opportunities of blacks living in the area. The resulting studies concluded that race relations would continue to deteriorate unless steps were taken to enhance the business opportunities of the black community.

On November 3, 1981, the Dade County Commission in response to these findings adopted Resolution No. R-1672-81.[3] The resolution recognized that past discrimi-

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stock of which is owned by one or more Blacks; and whose management and daily business operations are controlled by one or more such individuals.

Metropolitan Dade County, Fla., Ordinance No. 82-67 (July 20, 1982).

[2] The district court's findings are binding unless clearly erroneous. F.R.Civ.P. 52(a).

[3] Resolution No. R-1672-81 is set out in full in the Appendix.

nation had "to some degree" impaired the competitive position of black-owned businesses, resulting in a "statistically significant disparity" between the black population, the number of black businesses, and the number of county contracts awarded to black-owned enterprises. The resolution proceeded to announce a "policy of developing programs and measures to alleviate the problem . . ., including specific race conscious measures."

On July 20, 1982, the Dade County Commission adopted Ordinance No. 82-67 [4] as a measure designed to implement its policy of fostering black business growth. The Commission premised the ordinance on a finding that:

> Dade County has a compelling interest in stimulating the Black business community, a sector of the County sorely in need of economic stimulus but which, on the basis of past experience, is not expected to benefit significantly in the absence of specific race-conscious measures to increase its participation in County contracts.

The ordinance required that all proposed county contracts be reviewed to determine whether race-conscious measures would foster participation by black contractors and subcontractors. Bid credits, set-asides, minority participation goals and other devices were to be considered. The district court summarized the administrative procedures mandated by the ordinance as follows:

> a. Each department is charged with the responsibility of submitting its recommendations concerning Black set-asides and goals on each construction project under its jurisdiction;
>
> b. A three member contract review committee comprised of county officials is charged with the responsibility of reviewing the Departmental recom-

---

[4] Ordinance No. 82-67 is set out in full in the Appendix.

mendations and submitting a final recommendation on Black set-asides and goals to the county commission for final action;

c. Black subcontractors goals are to be based on "the greatest potential for Black subcontractor participation" and . . . "shall relate to the potential availability of Black-owned firms in the required field of expertise";

d. Availability of Black subcontractors should include "all Black-owned firms with places of business within the Dade County geographic area";

e. Black set-asides shall be considered where there exists at least three Black prime contractors with the capabilities consistent with the contract requirements;

f. A Black prime contractor can be under contract for up three set-asides within any one year period, but no more than one set-aside at a time;

g. Prior to implementation of a Black set-aside, the county commission is to make findings that the Black set-aside is "in the best interest of the County in order to waive formal bid procedures"; and

h. Bid procedures limiting bids to Black prime contractors would be implemented.[5]

Metro Dade, 552 F.Supp. at 922.

On July 21, 1982, the day following the passage of Ordinance No. 82-67, the county received and opened bid proposals for the Earlington Heights Station, part of a billion dollar rapid-rail transit system financed with federal, state and local funds. A non-black prime contractor, Peter Kiewit Sons' Company, submitted the lowest bid. The next lowest bid was tendered by Thacker Construction Company, a black prime contractor. These bids were

[5] The regulations are set out in full in the Appendix.

rejected for two reasons: (1) both exceeded the County Engineer's estimate of what the project should cost, and (2) the amounts of the bids had become public, rendering it impossible to conduct competitive bid negotiations under applicable federal regulations. The County Manager then proposed, and the Commission agreed, that the Earlington Heights contract be reviewed under the newly enacted ordinance.

After reviewing departmental recommendations, the Contract Review Committee proposed that the Commission waive the use of formal competitive bids, setting aside the Earlington Heights contract for competitive bidding exclusively among black contractors. In accordance with the administrative procedure provided by the ordinance, the Contract Review Committee found that there were a sufficient number of licensed black contractors in Dade County that possessed the requisite financial and technical capabilities to ensure competition for the contract. Additionally, the Committee suggested the inclusion of a subcontractor goal requiring that fifty percent of the contract's dollar value be awarded to black subcontractors. When combined with the general requirement that the prime contractor personally perform twenty-five percent of the contract, this meant that seventy-five percent of the Earlington Heights contract was being set-aside solely for black contractors.

On October 5, 1982, the Dade County Commission passed Resolution No. R-1350-82 [6] adopting the Committee's recommendations. The County issued notice that the contract was open for bidding subject to the one hundred percent set-aside and the fifty percent subcontractor goal. The closing date for submission and the opening of bids was set for November 17, 1982.

The plaintiff-appellees filed a complaint in the Southern District of Florida on November 12, 1982, seeking declar-

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[6] Resolution No. R-1350-82 is set out in full in the Appendix.

atory and injunctive relief. Jurisdiction was premised upon 28 U.S.C. § 1343 as an action seeking relief pursuant to 42 U.S.C. §§ 1981 and 1983 and 28 U.S.C. §§ 2201 and 2202. Two related state-law claims were asserted under the district court's pendent asserted under the district court's pendent jurisdiction. On November 16, 1982, after both sides presented evidence at a hearing, the district court granted the plaintiffs' motion for a temporary restraining order. On December 16, 1982, the court issued its memorandum opinion, declaring the one hundred percent set-aside unconstitutional, but upholding the use of the fifty percent subcontractor goal.

II.

Because resolution of appellees' pendent claims might render discussion of the federal constitutional claims unnecessary, we address those claims first. *Hagans v. Levine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). The plaintiff-appellees first contend that the County's preferential treatment policy violates the Dade County Home Rule Charter. The district court concluded that the Commission, pursuant to section 4.03(D) of the Charter, may waive competitive bidding when it determines waiver to be in the County's best interests. *Metro Dade*, 552 F.Supp. at 927-28. We agree with this conclusion and discuss the relevant Charter provisions more completely *infra* Slip op. at 1406-1407, at — - —.

Plaintiff-appellees also argue that the challenged policies contravene the Florida Constitution's due process and equal protection guarantees. The Florida courts have held that these provisions confer the same protection as their federal counterparts. *See Florida Canners Association v. Department of Citrus*, 371 So.2d 503, 513 (Fla.2d Dist.Ct.App.1979), *aff'd*, 406 So.2d 1079 (Fla. 1981); *Florida Real Estate Commission v. McGregor*, 336 So.2d 1156 (Fla.1976). Determination of this pendent claim, therefore, is necessarily dependent upon the disposition of the federal constitutional issue.

III.

The United States Supreme Court first directly confronted the constitutionality of affirmative action plans in *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). Bakke challenged an admissions program instituted by the University of California at Davis Medical School, whereby sixteen of the one hundred available places in the entering class were set aside solely for minority applicants. He contended that the program violated both Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.

No clear consensus emerged from the Court's decision. Five justices held that the strict racial quota was invalid, but only Justice Powell, utilizing a strict scrutiny standard of review, reached the decision on constitutional grounds. Justice Stevens, joined by the Chief Justice and Justices Stewart and Rehnquist, concurred in holding the program invalid, but did so on the basis of Title VI, not deciding the constitutional issue. Justices Brennan, White, Marshall and Blackmun, on the other hand, agreed with Justice Powell that Title VI was implicated only if the Equal Protection Clause was also violated, but, relying on an intermediate level of scrutiny, would have upheld the program's validity as substantial related to an important governmental interest.

The Court next addressed the issue in the context of a congressional affirmative action program for federal funding of public works projects. *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). The *Fullilove* Court upheld a statute that required local governments receiving funds under a federal public works program to use 10% of the funds for the procurement of services or supplies from statutorily defined minority owned and controlled businesses. Because *Fullilove* addresses the equal protection issue in the context of government construction contracts and funding, it is the

most relevant case to our constitutional inquiry. See *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167, 170 (6th Cir. 1983).

As in *Bakke*, the Court in *Fullilove* did not produce a majority opinion, with three different views emerging from those Justices voting to uphold the statute. Chief Justice Burger's opinion, in which Justices Powell and White concurred,[7] declined to adopt either a strict scrutiny or intermediate scrutiny standard. Instead of articulating a broad rule of law, the Chief Justice's opinion concentrated on "the context presented" in determining whether the statute's objective was within Congress' power and, if so, whether the means used was "narrowly tailored to the achievement of [Congress'] goal." 448 U.S. at 473, 480, 100 S.Ct. at 2772, 2775. The Chief Justice also broadly outlined those aspects that a reviewing court should consider when evaluating such programs:

> For its part, the Congress must proceed only with programs narrowly tailored to achieve its objectives, subject to continuing evaluation and reassessment; administration of the programs must be vigilant and flexible; and, when such a program comes under judicial review, courts must be satisfied that the legislative objectives and projected administration give reasonable assurance that the program will function within constitutional limitations.

448 U.S. at 490, 100 S.Ct. at 2871.

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[7] The district court referred to the Chief Justice's opinion as the "plurality opinion" in *Fullilove*. *Metro Dade*, 552 F.Supp. at 931. Two justices also concurred in Justice Marshall's opinion, however, meaning that neither the Chief Justice nor Justice Marshall's opinion garnered the support of a plurality. Thus, to the extent that the term "plurality opinion" connotes that an opinion commands more support than other opinions in the case, neither Chief Justice Burger nor Justice Marshall's opinion qualifies.

Justice Powell's concurrence reiterated his views in *Bakke* that strict scrutiny was the proper standard of review. The strict scrutiny test would require a finding that the racial classification was "a necessary means of advancing a compelling governmental interest." 448 U.S. at 496, 100 S.Ct. at 2783. This approach requires both specific findings of past discrimination and a choice of remedies "equitable and reasonably necessary to the redress of identified discrimination." *Id.* at 498, 510, 100 S.Ct. at 2785, 2791. Justice Powell also outlined five factors to consider in determining whether the strict scrutiny test is satisfied: (1) the efficacy of alternative remedies; (2) the planned duration of the remedy; (3) the relationship between the number of minority workers to be employed and the percentage of minority group members in the work force; (4) the availability of waiver provisions; and (5) the effect of the remedy on third parties. *Id.* at 510, 514, 100 S.Ct. at 2791, 2793.

Both Chief Justice Burger and Justice Powell's opinions stressed the fact that the statute in *Fullilove* was passed by Congress and should therefore be judged with deference to Congress' broad powers:

> Here we deal . . . not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.

Id. at 483, 100 S.Ct. at 2777; *see also id.* at 515 n.14, 100 S. Ct. at 2794 n.14 (Powell, J., concurring). Their emphasis on the fact that the Court was reviewing a Congressional statute suggests that constitutionally acceptable means of redessing past discrimination vary with the powers of the government body enacting the legislation.

Justice Marshall in his concurrence, joined by Justices Brennan and Blackmun, reaffirmed his view in *Bakke* that an intermediate standard of review was necessary, requiring that the use of benign racial classifications be "substantially related" to "an important and articulated" government purpose. *Id.* Justice Marshall believed that such an approach would guard against possible misuse or stigmatization while still allowing sufficient flexibility to redress past discrimination.

In light of the diversity of views on the Supreme Court, determining what "test" will eventually emerge from the Court is highly speculative. The district court, based upon a review of federal court cases following *Bakke* and *Fullilove*, concluded that strict scrutiny was the proper standard. We rely instead on what we perceive as the common concerns to the various views expressed in *Bakke* and *Fullilove*: (1) that the governmental body have the authority to pass such legislation; (2) that adequate findings have been made to ensure that the governmental body is *remedying* the present effects of past discrimination rather than advancing one racial or ethnic group's interests over another; and (3) that the use of such classification extend no further than the established need of remedying the effects of past discrimination. Legislation employing benign racial preferences, therefore, must incorporate sufficient safeguards to allow a reviewing court to conclude that the program will be neither utilized to an extent nor continued in duration beyond the point needed to redress the effects of the past discrimination.

This approach is most closely akin to that set out in Chief Justice Burger's opinion in *Fullilove*. Without adopting a formal "test," it attempts to balance the legitimate objective of redressing past discrimination with the concerns that the chosen means be "narrowly tailored" to the legislative goals so as to not unfairly impinge upon the rights of third parties. Furthermore, the program must be structured in such a way that it is

subject to reassessment and will be implemented in a manner that is flexible enough to account for changing needs and circumstances. 448 U.S. at 490, 100 S.Ct. at 2780.

IV.

A.

Pursuant to the above approach, we must first determine whether Metropolitan Dade County was a competent legislative body to adopt remedial measures designed to eliminate past discrimination. In *Fullilove*, both Chief Justice Burger and Justice Powell emphasized the "unique" role accorded Congress in dealing with past discrimination, 448 U.S. at 483, 500, 100 S.Ct. at 2777, 2786. We agree with the Sixth Circuit, however, that the references in *Fullilove* to Congress' power were not intended to imply that governmental bodies other than Congress may not act to remedy past discrimination, but were only emphasizing the "unequaled" power of Congress to act under its specific powers granted by the Fourteenth Amendment. *Ohio Contractors*, 713 F.2d at 172. Thus, although the scope of Congress' power to remedy past discrimination may be greater than that of the states, state legislative bodies are not without authority to ensure equal protection to persons within their jurisdictions. *Id.*

Whether the Metropolitan Dade County Commission as a political subdivision of the State of Florida had the power to enact the ordinance is a question of state law. Dade County operates pursuant to its Home Rule Charter, which specifically grants the county the power to waive competitive bidding when such waiver is in the county's best interests:

> Contracts for public improvements and purchases of supplies, materials, and services other than professional shall be made whenever practical on the basis of specifications and competitive bids. Formal sealed

> bids shall be secured for all such contracts and purchases when the transaction involves more than the minimum amount established by the Board of County Commissioners by ordinance. The transaction shall be evidenced by written contract submitted and approved by the Board. The Board, upon written recommendation of the Manager, may by resolution adopted by two thirds vote of the members present, waive competitive bidding when it finds this to be in the best interest of the county.

Metropolitan Dade County, Fla., Home Rule Charter § 4.03(D) (as amended through October 5, 1978). When this provision is coupled with the other broad powers granted by the Home Charter, *see Metro Dade*, 552 F. Supp. at 934, we agree with the district court's conclusion that the Commission was competent as a matter of state law to make findings of past discrimination and to enact remedial legislation. *Id.* at 927, 934.

B.

Having found that the Commission had the authority to enact the ordinance, we must now determine if the Commission made adequate findings to ensure that the county was acting to remedy the effects of past discrimination rather than advancing one group's interests over another based on a perceived need not founded in fact. We agree with the district court that the Commission made sufficient legislative findings to justify race-conscious remedies.

The court found that the Commission's actions were based on "reliable, substantial information complied by independent investigations." *Metro Dade*, 552 F.Supp. at 917 (Finding # 17). These investigations revealed that past discriminatory practices had impeded the development of black businesses, resulting in an economic disparity between blacks and other groups that had created unrest in the black community. *Id.* at 916 (Finding

16). Moreover, the court found from the evidence presented that although the present county government had not engaged in discriminatory practices, there had been "*identified discrimination* against Dade County black contractors at some point prior to the county's present affirmative action program." *Id.* at 925-26 (Finding # 41) (emphasis in original). The Commission in passing both Resolution No. R-1672-81 and Ordinance No. 82-67 relied on the above legislative findings as the premise for their actions, and these findings amply establish a governmental interest justifying the county's measures designed to remedy past discrimination. *See Ohio Contractors*, 713 F.2d at 170-171.

C.

We must next consider whether the Dade County ordinance facially incorporates sufficient safeguards to ensure that it is narrowly tailored to its legitimate objective of redressing past discrimination. After a careful review of the legislative provisions, we find that adequate safeguards exist to uphold the ordinance's constitutionality.

Before a set-aside or subcontractor goal is approved for a county construction contract, it must pass through three levels of administrative review. First, the county department must suggest through the County Manager which, if any, race-conscious measures are appropriate for the project being reviewed. Regs. 1.02 & 2.03. The suggestions are made on the basis of the availability of black contractors and the goals of the department. Reg. 1.02. Suggested actions may include the use of a set-aside, subcontractor goals, bid credits or no race-conscious measures at all. Reg. 1.04.

Next, the department's suggestions are reviewed by a three member Contract Review Committee. Regs. 2.01 & 2.02. The Committee formulates a recommendation on the advisability of the inclusion of race-conscious meas-

ures for the construction contract in question prior to the preparation of contract specifications. Regs. 2.04 & 2.06. This recommendation is then forwarded to the Board of County Commissioners. Reg. 2.06.

Finally, the Board conducts its review of the proposed measures, acting upon the Committee's recommendation and giving advice on how to proceed. Reg. 2.06. In the case of a set-aside, the Board must make findings that the set-aside would be in the best interests of the county before waiving formal bid procedures. Regs. 2.07 & 5.03.

The ordinance and regulations also set out criteria to guide the reviewing bodies as to whether set-asides and goals are appropriate. A set-aside may be used only upon findings that at least three certified black prime contractors are available and that the set-aside would be in the best interests of the county. Ord. 10-38(d)(2); Reg. 5.01. Subcontractor goals must be based upon estimates of the project's subcontracting opportunities and the availability of black subcontractors with the necessary expertise. Ord. 10-38(d)(1); Reg. 4.02.

In addition to the three-tiered review of each construction contract where race-conscious remedies are proposed, the entire program is also subject to periodic review and assessment. The Board must annually reassess the continuing desirability and viability of the program. Ord. § 10-38(e). This reassessment is in part based upon an annual report by the County Manager reporting the percentage of the value of county construction contracts awarded that year to black contractors and subcontractors. Ord. § 10-38(e). The County Manager is also charged with the duty of continually monitoring the program's use and periodically reporting its findings. Resol. § 3.

We find that these extensive review provisions provide adequate assurances that the county's program will not

be used to an extent nor continue in duration beyond the point necessary to redress the effects of past discrimination. Although no definite expiration date is specified, the Board is obligated to review the program annually to assess whether it should be continued or modified, and such a review adequately guarantees that the program will not be continued beyond its demonstrated need. See *Ohio Contractors*, 713 F.2d at 175 (no given expiration date required).[8] Likewise, although no target figure for the program's overall use is specified, adequate review mechanisms exist to ensure that the program will not be misused. Each contract where set-asides or goals are to be used must be approved at three different levels of the county government, and the entire program is subject to periodic monitoring and reassessment by the Board and County Manager.

Our conclusions on the adequacy of the program's safeguards are premised on the understanding that the review process, both for individual contracts and the entire program, will be conducted in a thorough and substantive manner. If the process is carried out in a conclusory fashion or extended beyond its legitimate purpose of redressing the effects of past discrimination, the plaintiffs may of course renew their challenge to the constitution-

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[8] A durational limit is one of the five factors that Justice Powell identified for assessing a program's constitutionality. 488 U.S. at 510, 512, 100 S.Ct. at 2791, 2792 (Powell, J. concurring). In *Ohio Contractors, supra*, the Sixth Circuit held that the lack of a durational limit was not "fatal" in light of the Ohio legislature's recognition of the need for future reassessment and reevaluation. 713 F.2d at 175. The dissent argued that the lack of a durational limit combined with what it believed was a lack of sufficient findings of past discrimination led to the statute "present[ing] a real danger of fostering a dependency upon favoritism, which is inimical . . . to the commands of the Equal Protection Clause." 713 F.2d at 176 (Engel, T., dissenting). Here, we have adequate legislative findings, *supra*, which ensure that Dade County is not merely "fostering a dependency upon favoritism," as well as an annual reassessment by the Board of the continued need for the program.

ality of the county's program. We decline to hold the ordinance facially unconstitutional, however, merely on the speculation that the county will not vigorously undertake implemenation of the review procedure.

V.

Having found that the ordinance is constitutionally acceptable, we must still determine whether the program was constitutionally applied to the Earlington Heights Station. After reviewing the record, we conclude that the set-aside and subcontractor goal were properly adopted by the county and were appropriately measures for the project.

After the formal bidding on the Earlington Heights contract was rejected,[9] the County Manager recommended that the contract be subjected to the newly enacted procedures of Ordinance No. 82-67. *Metro Dade*, 552 F.Supp. at 923. The Contract Review Committee, in accordance with the requisite administrative procedures, determined that a sufficient number of county black contractors were available with the requisite capability of serving as the prime contractor and recommended that bidding be set-aside. *Id.* The Committee also recommended a fifty percent subcontractor goal based on the availability of qualified black subcontractors and the requirements of the project. *Id.*

The Commission adopted the Committee's recommendations, finding:

> as a matter of fact that the use of both a set-aside and a goal on this contract will contribute towards eliminating the marked statistical disparity . . . between the percentage of overall Black business participation in County contracts and the percentage of Dade County's population which is Black.

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[9] The bids were rejected because they were substantially higher than the County's estimates and because the amount of the bids had become public. *Supra* Slip op. at 1403 at ——.

Resolution No. R-1350-82. In accordance with the ordinance's regulations, the Commission formally found the set-aside to be in the best interests of the county and waived formal bidding. The Commission also incorporated the prior legislative findings of Resolution R-1672-81, which had found both evidence of past discrimination and a need for fostering increased participation by the black business community.

The set-aside and subcontractor goal for the Earlington Heights Station were thus properly adopted by the Commission pursuant to the ordinance and its regulations.[10] The Contract Committee reviewed the availability of qualified black contractors and the demands of the project before making its recommendations, and the Board found the recommendations to be necessary to eliminating the vestiges of past discrimination in the awarding of county construction contracts.

Moreover, we find that the 100% set-aside and 50% subcontractor goal were appropriate, narrowly tailored measures to achieve the legislative objective. In so concluding, we find that the district court erred on several grounds in striking down the set-aside.

First, when discussing the set-aside's relationship to the percentage of black contractors and its impact on third parties,[11] the district court rejected the county's

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[10] The measures, of course, were not proposed prior to the completion of contract specifications (Regulation 1.02), as the contract had already been bid upon. We do not find, however, that in the context of the proceedings concerning the Earlington Heights Station that this omission in any way affected the validity of the set-aside or goal.

[11] We rely on Justice Powell's indicia for this part of our discussion not because we are adopting the "strict scrutiny" test, but because the district court relied upon them in its opinion. Moreover, these factors serve as a helpful guide in determining whether a statute satisfies the Equal Protection Clause, regardless of which standard of review is used.

argument that, viewed within the whole context of county procurement, the set-aside constituted only .6% of all county contracts over a ten year period: "It is the propriety of the 100% set-aside of the Earlington Heights Station that is for the determination of the Court. Nothing else." 552 F.Supp. at 937. Yet, when reviewing the 50% subcontractor goal, the court in essence undertook a "totality" review: "The record shows that this contract is but one out of twenty. It is located in the Black community and is a visible symbol of Black participation in the Metrorail system and county construction contracting in general." *Id.* at 941.

Although we do not agree that a ten year time frame is the proper reference point, a "totality" review is an appropriate means of ascertaining whether a program or its application is narrowly drawn.[12] Here, the estimated cost of approximately $6 million for the Earlington Heights Station, *id.* at 923, constitutes less than one percent of the county's annual expenditures of $620 million on contracts, *id.* at 917, and just over one percent of the approximately $581 million spent up to September 30, 1982 on the Dade County Metro rail system itself,[13] *id.* Considering that blacks constitute over seventeen percent

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[12] All three opinions in *Fullilove* voting to uphold the statute compared the 10% figure in the statute to the total expenditures by the United States government on construction contracts. 448 U.S. 484 n. 72, 100 S.Ct. 2778 n. 72 (Burger, C.J.); 448 U.S. 514-515, 100 S.Ct. 2793 (Powell, J. concurring); 448 U.S. 521, 100 S.Ct. 2796 (Marshall, J. concurring). *See also Ohio Contractors,* 713 F.2d at 173. The Court's reliance on all funds expended on construction work in the United States as its reference point is an even broader one than we rely upon here.

[13] The total cost of the Metrorail system is estimated at approximately one billion dollars, 552 F.Supp. at 917 (Finding #20), of which the Earlington Heights Station costs would constitute only .6%.

of Dade County's population, yet less than one percent of Dade county contractors are black, *id.* at 926, the effect of the set-aside and the subcontractor goal is not disproportionate to either the number of blacks and black contractors residing in the county or to the goal of increasing black business participation in order to redress past discrimination.[14] Likewise, considering the small percentage of overall construction contracts affected, we do not find that the set-aside impacts unfairly on third parties.[15] *Cf. Fullilove*, 448 U.S. 484 n. 72, 100 S.Ct. at 2778 n. 72; 448 U.S. at 514-15, 100 S.Ct. at 2793 (Powell, J., concurring).

Second, the district court used an abuse of discretion standard to determine whether the 50% figure was reasonable, but not for the 100% set aside. 542 F.Supp. at 936, 939. We find this inconsistent, as the effect of the 50% figure, although designated a "goals" provision, is to *set-aside* 50% of the contract's value for black contractors. We also question the use of an abuse of discretion standard in judging whether a percentage goal or set-aside is reasonable. Although Justice Powell did speak in his *Fullilove* concurrence of the set-aside percentage being within Congress' "discretion," he also noted that a higher level of scrutiny may be necessary for legislation passed by governmental bodies other than Congress. 448 U.S. at 515 n. 14, 100 S.Ct. at 2794 n. 14. We rely on the higher review standard of whether the percentages chosen, either as a set-aside or goal, are narrowly tailored to the legislative objective; we find that they are narrowly tailored here.

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[14] As of August 31, 1982, only 7% of the Metrorail construction was being performed by black contractors and subcontractors. 552 F.Supp. at 927 (Finding #21).

[15] We also note, as did the Sixth Circuit, that non-minority contractors may participate by owning up to 49% of a minority establishment. See, *supra* note 1; *Ohio Contractors*, 713 F.2d at 174.

Finally, we cannot agree with the district court that the set-aside was impermissible in light of alternative remedies or because it lacked an adequate waiver provision. The county was not required to choose the least restrictive remedy available, *see Fullilove*, 448 U.S. at 508, 100 S.Ct. at 2790 (Powell, J., concurring), and, as discussed above, the set-aside was chosen only after careful consideration of alternative methods and a formal finding by the Board that the set-aside was necessary in this case to redress the effects of past discrimination. Similarly, although the ordinance lacks a formal waiver provision, the set-aside was not approved until after the county had determined both that it would be in its best interests and that enough black contractors were available. These determinations adequately provided the same safeguard as a formal waiver provision, which would protect against the potentially unfair effect "if [the set-aside] were applied rigidly in areas where minority group members constitute a small percentage of the population." *Fullilove*, 448 U.S. at 514, 100 S.Ct. at 2793 (Powell, J., concurring).

VI.

This case has raised one of the most troublesome questions in the law: how to balance the legitimate goal of redressing past discrimination with concerns that remedial legislation will unfairly infringe on the rights of third parties. Here, we find that Metropolitan Dade County has kept within the restrictions of the Equal Protection Clause in enacting the challenged ordinance, and thus uphold its constitutionality both facially and as applied to the Earlington Heights Station.

The district court's judgment is REVERSED IN PART and AFFIRMED IN PART.

APPENDIX

Resolution No. R-1672-81

WHEREAS, it has consistently been the policy of this Board to foster economic growth and business opportunities for its population and to promote the development of local businesses; and

WHEREAS, this Board believes that the favorable economic status and future growth prospects of Dade County are integrally linked to the economic and social conditions of the County's Black communities, residents and businesses; and

WHEREAS, this Board established the Black Business Participation Task Force and charged that Task Force with, among other things, investigating and assessing the present extent of Black business activity within the County generally and specifically in relation to doing business with the County; and

WHEREAS, this Board hereby adopts the findings and conclusions of the Task Force; and

WHEREAS, that Task Force found a statistically significant disparity between the County's Black population and both the number of Black businesses within the County and those receiving County contracts; and

WHEREAS, this finding of the Task Force that Blacks have not proportionately shared in Dade County's economic development is in accordance with the findings and conclusions set forth in Black Owned Businesses in Metropolitan Miami, a Statistical Analysis of U.S. Census Data, prepared by Tony E. Crapp, Sr., Director, Business Development Division, Department of Trade and Commerce Development, City of Miami (December, 1980); An Economic Adjustment Plan for the Civil Disturbance Areas of the City of Miami and Dade County, prepared by Janus Associates (May, 1981); and the Report of the

Governor's Dade County Citizens Committee (October 30, 1980); copies of which reports are appended hereto, and the findings and conclusions of which are hereby adopted by this Board; and

WHEREAS, these reports have found that the gross economic disparity between the Black community and the other communities in Dade County has greatly exacerbated the frustrations of the Black community, which frustrations resulted in the May, 1980 riots and loom as sources of continuing racial and ethnic tensions; and

WHEREAS, this Board recognizes the reality that past discriminatory practices have, to some degree, adversely affected our present economic system and have impaired the competitive position of businesses owned and controlled by Blacks so as to result in this disproportionately small amount of Black businesses, and

WHEREAS, the causes of this disparity are perceived by this Board as involving the long standing existence and maintenance of barriers impairing access by Black enterprises to contracting opportunities and not as relating to the lack of capable and qualified Black enterprises ready and willing to work; and

WHEREAS, Dade County greatly impacts the local economy and business development through its spending of revenue for various County projects and other needs; and

WHEREAS, Dade County has a compelling interest in stimulating the Black business community, a sector of the community sorely in need of economic stimulus but which, on the basis of past experience, is not expected to benefit significantly in the absence of specific measures to increase its participation in County business; and

WHEREAS, this County has a compelling interest in promoting a sense of economic equality for all residents of the County; and

WHEREAS, this Board believes that in order to effectively combat the unemployment and lack of economic participation of the Black community, the Black population must be provided with the opportunity of owning and developing their own businesses,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA:

Section 1. This Board hereby adopts the policy of developing programs and measures to alleviate the problem of lack of participation of Blacks in the County's economic life and to stimulate the local Black economy, including specific race conscious measures.

Section 2. Any program or procedure established pursuant to Section 1 above, shall continue until its objectives are met and must maintain sufficient flexibility to be able to achieve its purpose while still remaining viable in terms of the needs of the County to transact its business.

Section 3. The County Manager shall monitor such programs and present periodic reports to the Board as to their efficacy and viability.

ORDINANCE NO. 82-67:

WHEREAS, this Board has previously made the legislative finding in Resolution No. R-1672-81, adopted November 3, 1981, that Blacks have not proportionately shared in Dade County's economic development and has initiated a policy to promote increased participation of Black-owned businesses in County contracts; and

WHEREAS, such findings and the bases therefor as contained in said Resolution No. R-1672-81, a copy of which is attached hereto, are hereby adopted as the legislative findings on which this Ordinance is based; and

WHEREAS, the above findings are in accordance with the findings and conclusions of the June 1982 report of the United States Commission on Civil Rights entitled, "Confronting Racial Isolation in Miami", a copy of which is appended hereto; and

WHEREAS, the government in Metropolitan Dade County greatly impacts the local economy and business development through its spending of revenue for various County projects and other needs; and

WHEREAS, Dade County has a compelling interest in stimulating the Black business community, a sector of the County sorely in need of economic stimulus but which, on the basis of past experience, is not expected to benefit significantly in the absence of specific race-conscious measures to increase its participation in County contracts,

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA:

Section 1. Article II of Chapter 10 of the Code of Metropolitan Dade County, Florida, is amended by adding the following new section thereto:

Sec. 10-38. *Procedure to increase participation of Black contractors and subcontractors in county contracts.*

(a) The foregoing recitations are hereby incorporated and adopted herein and made a part of this Ordinance.

(b) Except where federal or state law or regulations mandate to the contrary, the provisions of this Section shall be applicable to all construction contracts funded in whole or in part by county funds.

(c) (1) "Black contractor and subcontractor" means a contracting or subcontracting business entity which is owned and controlled by one or more Blacks and has established a place of business in Dade County.

(2) "Owned and controlled" means a business which is at least 51 percentum owned by one or more Blacks, or, in the case of a publicly-owned business, at least 51 percentum of the stock of which is owned by one or more Blacks; and whose management and daily business operations are controlled by one or more such individuals.

(3) "Black" means a person who is a citizen or lawful permanent resident of the United States and who has origins in any of the Black racial groups of Africa.

(d) The County Manager shall establish an administrative procedure for the review of each proposed County construction contract to determine whether the inclusion of race-conscious measures in the bid specifications will foster participation of qualified Black contractors and subcontractors in the contract work. Such race-conscious measures may include goals for Black contractor and subcontractor participation and set-asides.

(1) *Goals.* When utilized, goals shall be based on estimates made prior to bid advertisement of the quantity and type of subcontracting opportunities provided by the project to be constructed and on the availability and capability of Black contractors and subcontractors to do such work. When goals are utilized, the invitation for bid and bid documents shall require the apparent lower and qualified bidder prior to bid award to meet the goal or demonstrate that he made every reasonable effort to meet the goal and notwithstanding such effort were unable to do so. In the alternative, the bid documents may require such demonstration regarding the goal or efforts to meet it to be included by all bidders as part of their bid submission. The steps required to demonstrate every reasonable effort shall be specified in the invitation for bid and the bid documents.

(2) *Set-asides.* A set-aside is the designation of a given contract for competition solely among Black contractors. Set-asides may only be utilized where prior to invitation for bid, it is determined that there are sufficient licensed Black contractors to afford effective competition for the contract. In each contract where set-asides are recommended, staff shall submit its recommendation and the basis therefor to the Board for its initial review and determination whether waiver of competitive bidding for such contract is in the best interest of the County."

(e) The County Manager shall annually report to the Board on the total dollar amount of County construction contracts awarded that year and the percentage thereof to be performed by Black contractors and subcontractors. At such time, the Board shall determine whether to continue in effect the administrative procedure for utilization of race-conscious measures authorized by this Ordinance.

Section 2. Section 10-34 of the Code of Metropolitan Dade County, Florida, is hereby amended as follows:

Sec. 10-34. Listing of subcontractors not required; exceptions.

Except for contracts for procurement or construction of all or any part of stage 1 of the rapid transit system, *construction contracts where race-conscious measures have been included in the bid specifications to foster participation of Black contractors or subcontractors,* or where federal or state law or regulations mandate to the contrary, no prime contractor submitting a bid for a project for which bids have been solicited by the legal entities to which this article applies shall be required to list thereon the names of any subcontractors it desires to be employed in connection with the subject project.

Section 3. Section 25A-4 of the Code of Metropolitan Dade County, Florida is hereby amended by adding the

following paragraph at the end of subparagraph (b) of said section:

> For all construction contracts, the trust shall comply with the provisions of Section 10-38 of the County Code and the administrative procedures adopted pursuant to said section.

Section 4. Section 32A-1 of the Code of Metropolitan Dade County, Florida, is hereby amended by adding the following after the last sentence of said section:

> For all construction contracts, the authority shall comply with the provisions of Section 10-38 of the County Code and the administrative procedures adopted pursuant to said section.

Section 5. If any section, subsection, sentence, clause or provision of this ordinance is held invalid, the remainder of this ordinance shall not be affected by such invalidity.

Section 6. It is the intention of the Board of County Commissioners, and it is hereby ordained that the provisions of this ordinance shall become and be made a part of the Code of Metropolitan Dade County, Florida. The sections of this ordinance may be renumbered or relettered to accomplish such intention, and the word "ordinance" may be changed to "section", "article", or other appropriate word.

Section 7. This ordinance shall become effective ten (10) days after the date of its enactment.

REGULATIONS GOVERNING BID PROCEDURES UNDER ORDINANCE NO. 82-67:

1. DEPARTMENT RESPONSIBILITIES

1.01 All departments (including the Public Health Trust and the Miami-Dade Water and Sewer Authority with funds budgeted for capital improvement projects are to

develop a record keeping system which will include the dollar value of all construction contracts anticipated, a goal for Black participation for the fiscal year, and the dollar value of contracts awarded by minority classification.

1.02 Prior to the completion of contract specifications for each capital project, each department, in conjunction with the consultant project manager, if engaged, will analyze the trades certifications required for each project. After considering the number and types of Black-owned firms likely to be available to participate in the contract, the goals of the department, and a suggestion as to the type of race-conscious measures which could be provided within the contract work are to be developed.

1.03 Suggested actions shall be for (a) establishment of subcontractor goals, (b) set-asides for contractors, (c) bid credit and (d) no race-conscious requirements.

1.04 Each project is to be submitted to a Contract Review Committee for action and recommendation to the Board of County Commissioners.

2. CONTRACT REVIEW COMMITTEE

2.01 A three (3) member Contract Review Committee comprised of an Assistant County Manager, the Capital Improvements Coordinator and the Affirmative Action Coordinator is created. Staff to the Committee will be provided by a Compliance Office included within the Affirmative Action Division.

2.02 The Committee is to meet monthly or sooner, as necessary, for the purpose of reviewing suggestions for the inclusion of race-conscious measures within contract specifications of each construction project.

2.03 Suggested race-conscious actions are to originate by the County project manager for the construction project and the consultant project manager, if commissioner.

2.04 Projects are to be submitted to the Contract Review Committee prior to preparation of the contract specifications.

2.05 The Contract Review Committee, after considering the number of anticipated subcontractors likely to be employed on the job, will recommend at what point the subcontractors will be listed.

2.06 Following review by the Contract Review Committee, a recommendation is to be submitted to the Board of County Commissioners for action, together with the request for advisement.

2.07 Recommendations for set-aside projects require a waiver of formal competitive bids by the Board of County Commissioners.

3. CERTIFICATION

3.01 All firms participating in the Black Contractors and Subcontractors Program will be certified as Black firms.

3.02 Certification records will be maintained by the Contract Compliance Office within the Dade County Affirmative Action Division.

3.03 Assistance in the certification process will be provided by authorized community-based organizations under contract with Dade County.

3.04 Applications for certification will be on standard forms and will include, but will not be limited to, primary business location, evidence of ownership, operation, experience, and the adequacy of the firms.

3.05 Appeals of denials of certification can be made to the Contract Review Committee.

3.06 Certification of all firms will be updated annually.

3.07 Certification of each firm shall be completed prior to the award of any contract under the Black Contractors Program.

3.08 A concentrated, public advertising campaign by trade certification area will be undertaken to encourage certification.

4. SUBCONTRACTOR GOALS

4.01 Percentage goals for the dollar value of subcontractor work are to be considered when the review of the proposed contract indicates the greatest potential for Black subcontractor participation.

4.02 Goals shall relate to the potential availability of Black-owned firms in the required field of expertise.

4.03 Availability should include all Black-owned firms with places of business [that] are within the Dade County geographic area.

4.04 When goals are included with the contract of the prime contractors, bidders shall use good faith efforts to meet the goals.

4.05 Lack of good faith efforts will make the prime contractor's bid ineligible for award and not responsive.

4.06 A prime contractor may include the subpart of the volume of value of a joint venture of a certified subcontractor towards the contract goal.

5. SET-ASIDES

5.01 Contracts for set-asides shall be considered in those contracts when at least three (3) certified prime contractors with the capabilities consistent with the contract requirements exist.

5.02 A prime contractor can be under contract for only one (1) set-aside contract at a time, and no more than three (3) within any one (1) year period.

5.03 Prior to the advertising for set-aside contracts, the Board of County Commissioners is to make findings as

to the proposed set-aside contract in the best interest of the County and waiving formal bid procedures.

5.04 Bid procedures limiting competitive bids to Black certified firms will be implemented.

6. BID CREDIT

6.01 Implementation of bid credit will not be done at this time.

RESOLUTION NO R-1350-82:

WHEREAS, this Board on November 3, 1981, adopted Resolution No. R-1672-81, finding that Blacks have not proportionately shared in Dade County's economic development and setting forth a policy to promote increased Black business participation in County business; and

WHEREAS, this Board on July 20, 1982, enacted Ordinance No. 82-67 which requires review of proposed county construction contracts to determine whether the addition to bid specifications of race conscious measures will foster participation of Black contractors and subcontractors in the contract work; and

WHEREAS, pursuant thereto the County Manager has created a contract review committee to review each construction contract prior to advertisement and to make recommendations thereon to this Board; and

WHEREAS, the committee has reviewed the Metrorail Earlington Heights Station contract together with the data and suggestions submitted by the Dade County Transportation Administration; and

WHEREAS, the committee has determined that there are sufficient licensed Black general contractors to afford effective competition for the station contract were the contract set aside for competition solely among Black contractors, and based thereon has recommended use of a set-aside on this contract; and

WHEREAS, in addition thereto, the committee has estimated the quantity and type of subcontracting opportunities provided by the contract and the availability and capability of Black contractors and subcontractors to do such work and based thereon has recommended a goal of fifty percent (50%) of the dollar value of the contract to be subcontracted to Black contractors; and

WHEREAS, Earlington Heights is the last of the 20 Metrorail stations to be bid and is located within the Black community of Dade County; and

WHEREAS, increased participation of Black contractors and subcontractors on this contract will have a substantial impact in the community to be served by this station both in terms of the credibility of the County's efforts to involve Black-owned businesses in the economic growth of this County and in terms of greater employment opportunities for members of such community; and

WHEREAS, this Board specifically finds and determines as a matter of fact that the use of both a set aside and a goal on this contract will contribute towards eliminating the marked statistical disparity, noted in this Board's prior legislation, between the percentage of overall Black business participation in County contracts and the percentage of Dade County's population which is Black; and

WHEREAS, this Board further finds that the use of both a set aside and a goal will help to alleviate unemployment and stimulate the Black business community, a sector of Dade County's economy which is sorely in need of economic stimulus, but which on the basis of past experience cannot be expected to receive any significant amount of the public funds to be expended on this contract in the absence of such race conscious measures,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, that:

1. Resolution No. 4-1672-81 [sic] and Ordinance No. 82-67, together with the findings contained therein, and the documents and reports attached thereto, and the foregoing recitations are hereby incorporated and adopted as the legislative findings of this Board and are made a part of this resolution.

2. The recommendations of the contract review committee are accepted by this Board.

3. This Board finds that it is in the best interests of Dade County to waive formal competitive bidding procedures for the Earlington Heights Metrorail Station contract, and authorizes the set aside of such contract for competition solely among Black contractors, formal bidding being waived in this instance pursuant to Section 4.03(D) of the Home Rule Charter by two-thirds (⅔) vote of the Board members present.

4. In addition to the set aside, a goal of 50% of the dollar value of the contract work for Black subcontractors is adopted on this project.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

OFFICE OF THE CLERK
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

March 22, 1984

Spencer D. Mercer
Clerk

In Replying, Give Number
of Case and Names of Parties

TO ALL PARTIES BELOW:

No. 83-5001

SOUTH FLORIDA CHAPTER vs. METROPOLITAN DADE COUNTY

D.C. Docket No. 82-2427-CIV-JWK

This is to advise that an order has this day been entered denying the petition ( ) for rehearing.

☐ The Court having been polled at the request of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure: Circuit Rule 26), the petition ( ) for rehearing en banc has also been denied.

☒ No member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 26), the petition ( ) for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Very truly yours,
SPENCER D. MERCER
Clerk

By /s/ Karen B. Sinyard
Deputy Clerk

Enc: Court Order

cc: Robert A. Ginsburg
Gordon Dean Rogers
David V. Kornreich
John W. Caven, Jr.
Stephen J. Parker
G. Brockwel Heylin
Robert A. Cuevas, Jr.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-5001

SOUTH FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., *et al.*,
Plaintiffs-Appellees,
Cross-Appellants,

versus

METROPOLITAN DADE COUNTY, FLORIDA, *et al.*,
Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 27, 11 Cir., 198-, —— F.2d ——).

[Filed Mar. 22, 1984]

Before KRAVITCH/HENDERSON/ANDERSON, Circuit Judges.

PER CURIAM:

☒ The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

☐ The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure;

Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

☐ A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

OFFICE OF THE CLERK
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

April 11, 1984

Spencer D. Mercer
Clerk

In Replying, Give Number
of Case and Names of Parties

MEMORANDUM TO COUNSEL OR
PARTIES LISTED BELOW:

No. 83-5001

SOUTH FLORIDA CHAPTER vs.
METROPOLITAN DADE COUNTY

D.C. Docket No. 82-2427-CIV-JWK

The following action has been taken in the above case:

—— AN EXTENSION OF TIME has been granted to and including

—— for filing appellant's/petitioner's brief.

—— for filing appellee's/respondent's brief.

—— for filing reply brief.

—— for filing petition for rehearing.

—— It is specifically understood and agreed by the movant for extension, that the document above will be filed on or before this new date, and further agreed that no additional extensions will be requested by the movant.

—— Motion to consolidate granted.

—— Motion to supplement or correct the record granted.

—— Motion for leave to file supplemental brief granted.

—— Motion for leave to file brief *amicus curiae* is granted.

—— Joint motion as to time for filing briefs is granted.

XX Order enclosed has been entered.

SPENCER D. MERCER
Clerk

By: /s/ Karen B. Sinyard
Deputy Clerk

Enc: Court Order

cc: Robert A. Ginsburg
Gordon Dean Rogers
David V. Kornreich
John W. Caven, Jr.
Stephen J. Parker
G. Brockwel Heylin

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-5001

SOUTH FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., *et al.*,
Plaintiffs-Appellees
Cross Appellants.

versus

METROPOLITAN DADE COUNTY, FLORIDA, *et al.*,
Defendants-Appellants
Cross Appellees.

Appeal from the United States District Court for the Southern District of Florida

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[Filed Apr. 11, 1984]

ORDER:

( ) The motion of appellees/cross-appellants for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of appellees/cross-appellants for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including May 21, 1984, the

stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of ———————— for a further stay of the issuance of the mandate is GRANTED to and including ————————, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of ———————— ———— for a further stay of the issuance of the mandate is DENIED.

/s/ Phyllis A. Kravitch
United States Circuit Judge

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. FLORIDA

No. 82-2427-Civ-JWK

SOUTH FLORIDA CHAPTER OF THE ASSSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., *et al.*,
Plaintiffs,

v.

METROPOLITAN DADE COUNTY, FLORIDA, *et al.*,
Deffendants.

Dec. 16, 1982

David V. Kornreich and Gordon Dean Rogers, Miami, Fla., for plaintiffs.

Robert A. Ginsburg and R. A. Cuevas, Jr., Miami, Fla., for defendants.

Theodore Klein, Miami, Fla., for Thacker Const. Co.

Leon E. Sharpe, Miami, Fla., for Allied Contractors Ass'n and Alfred Loyd & Sons, Inc.

MEMORANDUM OPINION CONTAINING FINDINGS OF FACTS AND CONCLUSIONS OF LAW

KEHOE, District Judge.

I.

This is an action alleging, among other things, that plaintiffs are being discriminated against because of their race in violation of the Fourteenth Amendment to the United States Constitution. The central issue for determination is important and fundamental: how far can a local government apply a race conscious affirmative ac-

tion plan before that plan violates a person's constitutionally guaranteed right to the equal protection of the laws? Put another way, may a local government initiate a race-conscious policy of favoring a disadvantaged minority group at the expense of members of a non-minority group?

Plaintiffs are White construction contractors and subcontractors who have been adversely affected by Metropolitan Dade County's recently enacted race-conscious ordinance. This ordinance has two major features: a "set-aside" provision that limits competition for certain designated county contracts exclusively among Black contractors; and a "goals" provision that sets a certain percentage dollar amount of a county contract to be subcontracted to Black contractors.

For reasons fully explained in the body of this opinion, it is the considered judgment of the Court: (a) that the "set-aside" provision of the county's race-conscious ordinance conflicts with the equal protection clause of the Fourteenth Amendment; and (b) that the "goals" provision falls within the ambit of county discretion and is constitutionally permissible. Accordingly, plaintiffs are entitled to a judgment declaring that the set-aside provision of the defendants' race conscious policy is unconstitutional, and a permanent injunction enjoining the defendants from applying the set-aside to the contract that is the subject of this action.

II.

Plaintiffs are non-profit corporations and trade associations challenging certain ordinances, resolutions and policies enacted by Metropolitan Dade County and mandating that minority set asides and goals be established for selected county construction contracts to be bid and awarded. The defendants are the county, its Board of County Commissioners, the county manager and the county transportation coordinator.

Plaintiffs filed their complaint seeking a declaratory judgment and injunctive relief on November 12, 1982. Jurisdiction over this cause was invoked pursuant to 28 U.S.C. § 1343 as an action seeking relief under 42 U.S.C. §§ 1981 and 1983 (the civil rights acts) and 28 U.S.C. §§ 2201 and 2202 (declaratory judgments). The Court's pendent jurisdiction was invoked over two related state claims.

On November 15, 1982 plaintiffs filed their motion for preliminary injunction, or in the alternative, motion for a temporary restraining order, seeking to enjoin the county from opening the bids submitted on the Earlington Heights Metrorail Station project. Since these bids were scheduled to be opened on November 17, 1982, the Court held a hearing on the motion for a temporary restraining order on November 16, 1982. The defendants were notified of this action and of the scheduled hearing, and appeared in opposition to the motion. At the conclusion of the hearing, after receiving testimony of witnesses and argument of counsel, the Court announced that it would issue a temporary restraining order against the defendants. The following day a temporary restraining order was issued restraining the defendants from opening the bids for the Earlington Heights Metrorail Station project, contract no. N336R, and from taking any other action to finally award this contract to any bidder pending a final determination of the merits of plaintiffs' complaint.[1] By this written order and previous announcement, the Court accelerated this cause for final hearing to commence on November 26, 1982 and directed the de-

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[1] The Court found that plaintiffs met the four criteria for injunctive relief set out in *Canal Authority of the State of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974): (a) that there was a substantial likelihood that plaintiffs would prevail on the merits; (b) that plaintiffs would suffer irreparable injury if injunctive relief was not granted; (c) that the threatened harm to the plaintiff outweighed the threatened harm the injunction may do to the defendants; and (d) that the granting of injunctive relief would not disserve the public interest.

fendants to file their answer to the complaint by November 23, 1982. Also, by separate order, the Court permitted intervenor Thacker Construction Company to intervene as a party defendant. Just prior to the final hearing, Allied Contractors Association and Alfred Lloyd & Sons, Inc. also filed a joint motion to intervene in this action. This motion was granted *ore tenus* by the Court.

This cause came on for final hearing on November 26, 1982 at which extensive evidence was adduced and legal argument heard from all parties.[2] At the conclusion of this hearing the Court took all of the issues under consideration pending the release of this memorandum opinion. After considering the entire record developed in this proceeding[3] as well as all of the legal memoranda submitted, the Court now makes its findings of fact and publishes its conclusions of law in accordance with Fed. R.Civ.P. 52(a).[4]

III.

The Court makes the following findings of fact:

A.

1. Plaintiff South Florida Chapter of The Associated General Contractors Of America, Inc. (the "general contractors") is a Florida not-for-profit corporation with its

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[2] The intervenors chose not to present any evidence of their own but relied instead on the defense presented by the county defendants. Both intervenors were permitted oral argument and submitted memoranda of law on the legal issues raised by this action.

[3] For the purposes of this memorandum opinion the Court has incorporated all of the evidence introduced at the hearing on the motion for a temporary restraining order of November 16, 1982 and the final hearing of November 26, 1982. The transcripts of both hearings have been consulted in the preparation of this opinion.

[4] To the extent that any of the findings of fact constitute conclusions of law they are adopted as such. Conversely, to the extent that any of the Court's conclusions of law are found to be findings of fact, they are so adopted.

principle offices and place of business in Dade County, Florida, and is organized for the purpose of furthering and representing the interests of general contractors in the construction industry. This plaintiff is a trade association which has a membership comprised of, *inter alia*, sixty-two general contractors, many of whom regularly bid on and perform construction work for Metropolitan Dade County.

2. Plaintiff Engineering Contractors Association Of South Florida, Inc. (the "engineering contractors") is a not-for-profit corporation having its principle offices and place of business in Dade County, Florida. This Plaintiff is a trade association comprised of eighty-two member firms which include, *inter alia*, general contractors, many of whom regularly bid on and perform construction work for Metropolitan Dade County. Plaintiff's members also include, *inter alia*, subcontractors, many of whom regularly bid on and perform construction work for Metropolitan Dade County.

3. Plaintiff Air Conditioning, Refrigeration, Heating and Piping Association, Inc., a/k/a Mechanical Contractors Association Of South Florida (the "mechanical contractors") is a Florida not-for-profit corporation, having its principle office in Dade County, Florida and is organized to further and represent the common interests of mechanical contractors in the construction industry. The membership of this plaintiff is comprised of more than eighty mechanical contractors and subcontractors, many of whom regularly bid on and perform construction work for Metropolitan Dade County.

4. Defendant Metropolitan Dade County, Florida, ("Dade County" or "county"), is a chartered political subdivision of the State of Florida operating under Article VIII, Section 6 of the Florida Constitution of 1968, the Dade County Home Rule Charter and the laws of the State of Florida. At all times material herein, Dade County, through its Office of Transportation Adminis-

tration, was engaged in the construction of a mass transit system generally known as the Metrorail System, including the Earlington Heights Station, contract N336R. As the owner of the Metrorail System, the county was responsible for establishing bid procedures and specifications on all Metrorail projects, including the Earlington Heights Station.

5. Defendants Barbara M. Carey, Clara Oesterle, Beverly B. Phillips, James F. Redford, Jr., Harvey Ruvin, Barry D. Schreiber, Ruth Shack, Jorge E. Valdes and Stephen P. Clark comprise the membership of the Board of County Commissioners of Dade County (the "county commission" or "commission"). At all times material herein, defendants Carey, Oesterle, Phillips, Redford, Ruvin, Schreiber, Shack, Valdes and Clark voted on and passed all ordinances, resolutions, and policies mandating the establishment of Black prime contractor set-asides and Black subcontractor goals on all Dade County construction projects, including Metrorail construction projects. The county commission specifically established and implemented Resolution No. R1350-82, requiring that the Earlington Heights Metrorail Station project, contract no. N336R, be set-aside for a Black prime contractor only and that fifty percent or more of the value of the prime contract on such project be set-aside for Black subcontractors.

6. Defendant Merrett Stierheim is the county manager of Dade County (the "county manager" or "manager"). At all times material herein, Mr. Stierheim was the Chief Administrative and Executive Officer of Dade County and was responsible for the implementation and administration of all ordinances, resolutions, and policies established by the commissioners, including those relating to the establishment and implementation of Black set-asides and goals on Metrorail System construction projects and other Dade County construction projects.

7. Defendant Warren J. Higgins is the Transportation Coordinator of Dade County's Office of Transportation

Administration. At all times material herein, Mr. Higgins (the "transportation coordinator"), acting under the supervision and the direction of the county manager, was the Metropolitan Dade County official primarily responsible for the bid procedures and specifications on the Metrorail System, including the Earlington Heights Station Project, contract no. N336R.

8. Intervenor Thacker Construction Co. ("Thacker") is an Illinois Corporation with its principal place of business in Illinois, but licensed to do business in the State of Florida and maintaining an office in Dade County, Florida. Thacker is in the general contracting business in Dade County, Florida and is presently performing construction work for Dade County as a prime contractor on the North Bus Maintenance Facility project. Intervenor Thacker initially bid the Earlington Heights Station project on July 21, 1982 and is presently rebidding that project.

9. Intervenor Allied Contractors Association, Inc., ("Allied" or "Allied Contractors"), is a Florida not-for-profit corporation with its principle office and place of business in Dade County, Florida. Intervenor Allied is a trade association organized for the purpose of furthering and representing the interests of Black contractors and subcontractors in the construction industry. Members of Allied Contractors regularly bid on and perform construction work for Metropolitan Dade County. Intervenor Alfred Lloyd And Sons, Inc., ("Alfred Lloyd") is a Black-owned contractor and is a member of Allied Contractors.[5]

B.

10. In recent years Dade County has experienced tremendous demographic and social change. As a consequence of the Hispanic migration to Dade County, non-

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[5] The foregoing findings of fact have been stipulated to by plaintiffs and the county. See joint stipulation filed November 30, 1982.

Hispanic Whites no longer constitute a majority of the county's population, although they barely remain the largest of the three ethnic groups. The Black population has dropped from second to third in size. Dade County estimates, based on preliminary 1980 Census data, indicate that Hispanics now comprise 41 percent of the population, Blacks 16 percent, and non-Hispanic Whites 43%. At the time this case was commenced, the Black population of Dade County was estimated to be 17.2% based upon final census data.

11. Dade County's economy has grown consistently faster than that of the nation as a whole. In 1956, the private sector provided 224,000 jobs in approximately 20,000 different business establishments in Dade County. Twenty-one years later, the private sector economy had added another 300,000 jobs and 18,000 establishments. The job market increased 133.4 percent, and there was a 92.2 percent increase in the number of businesses. Nationally, during the same period, the number of jobs had grown only 59.7 percent and the number of business establishments only 39.1 percent. Similarly, the wholesale and retail trade industries in Dade County added 78,131 jobs and 6,350 businesses between 1956 and 1977, increases of 103.4 percent and 89.5 percent, respectively. Nationally, jobs in the same industries grew only 65.9 percent and new establishments only 39.1 percent during the same period.

12. In the construction industry, however, the national rate of growth for the period from 1956 to 1977 exceeded Dade County's rate. The number of jobs in the construction industry increased 40.9 percent nationally and 21.3 percent in Dade County, and the number of construction businesses increased 49 percent nationally and 39.3 percent in Dade County.

13. Statistical data in the record indicates that in 1977 only one percent of business establishments in Dade County were Black-owned. Of these, about 82 percent

are owner operated with no additional employees. In the county's expenditures for major services and professional services agreements, only 2 percent of these contracts have gone to Black-owned businesses, amounting to 3.7 percent of the dollars expended. In the awarding of construction contracts and procurement, less than 1 percent of the firms involved being Black-owned, the dollar amount expended for contracts awarded to Black-owned firms amounted to only 1.4 percent of the total dollar value of all county construction contracts let.

C.

14. In the aftermath of the May, 1980 Liberty City civil disturbances, Dade County set out to investigate and assess the present extent of Black business activity within the county generally and specifically in relation to doing business with Dade County. Several investigations were undertaken by outside consultants and committees into the underlying causes of these civil disturbances. Included among their findings was an analysis of the extent to which Black businesses received county contracts. The findings, conclusions and recommendations are set forth in these reports and studies: the Black Business Disparity Study, Prepared by the Disparity Study Group Task Force (October 27, 1981); Black-Owned Business in Metropolitan Miami, A Statistical Analysis of U.S. Census Data, prepared by Tony E. Crapp, Sr., Director, Business Development Division, Department of Trade and Commerce Development, City of Miami (December, 1980); An Economic Adjustment Plan for the Civil Disturbance Areas of the City of Miami and Dade County, prepared by Janus Associates (May, 1981); and the Report of the Governor's Dade County Citizens' Committee (October 30, 1980).[6] These reports formed the basis for the development of the county's race-conscious policy.

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[6] A later report issued by the United States Commission on Civil Rights called "Confronting Racial Isolation In Miami," was re-

a. The Report of the Governor's Dade County Citizens Committee listed the major causes leading to the civil disturbances as (1) poverty, unemployment and underemployment; (2) slum housing and living conditions; (3) functional illiteracy; (4) the perception among Blacks of the local criminal justice system; (5) inadequate youth recreational facilities and activities; (6) political deprivation; (7) hard core juvenile delinquency; and (8) the general failures of society. The report contained a number of recommendations designed to expand the employment opportunities for Blacks, improve the quality of public and low cost housing, increase the complement of Black police officers, and provide special educational attention for Black students. The report concluded with an eloquent plea for cooperation from all levels of government, and all sectors of the community, to join together to create the type of overall program required to eliminate the underlying causes of racial tension in Dade County.

b. A second report entitled "An Economic Adjustment Plan for the Civil Disturbance Areas of the City of Miami and Dade County" (the "Janus Report"), was made by Janus Associates, a private consulting firm. This report was intended to be a comprehensive evaluation of the economic situation in the Black communities of Dade County as part of an overall proposal for the development of an economic and adjustment assistance plan for the areas impacted during the 1980 civil disturbances. Although this report made numerous findings as to the economic condition of the local Black population, and offered a number of recommendations, for our purposes, only a couple need to be mentioned. The report found that Black business development in Dade

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leased in June 1982. The findings and recommendations contained in that report confirmed much of what the earlier reports said. The county later adopted the Civil Rights report in addition to the others. See Findings of Fact No. 28.

County lagged far behind, not only that of the local White and Hispanic communities, but that of Blacks in most major cities elsewhere in the United States. This and other disparities between the Black community and the rest of the county represented a major threat to Miami's continued growth and development as a center of international trade, commerce and tourism. Along with its other recommendations, Janus urged the development of affirmative action and set-aside programs to maximize the opportunities of Black-owned businesses in the public sector.

c. In passage after passage in the Janus report, the authors described the critical nature of the economic condition in the Black community. Several short selections deserve quotation:

> The Black community presently lacks the tools of development necessary for economic growth and the confidence that economic progress can occur. There are few capital instruments in and for the Black community and few strong, experienced and well-supported Black economic and business development organizations. Entrepreneurial development is minimal, and there are few models of business success to inspire and provide examples for potential businesspersons.

Janus Report at III-2.

> Against th[e] background of a thriving, growing regional economy, the economic and demographic profile of the Black community of Dade County projects a contrasting picture. Alone among the . . . three major population groups, Blacks have not participated equitably in this general prosperity or in the major growth sectors, in terms of either jobs or business development.

Ibid. at IV-16.

> Janus' assessment is that the Black community of Miami remains frustrated and explosively volatile, and that only a sustained, all-out effort to remove the disparities that separate Blacks from the rest of the community will reverse this deeply entrenched mood.

Ibid. at V-17.

d. The Black Business Disparity Study Management group found that Black business participation in the general economy of Dade County and the business activity of the Metropolitan Dade County government were both at a level far below their proportion of the population as a whole.

e. Finally, in the study entitled, "Black-Owned Businesses in Metropolitan Miami," statistical data was adduced that in the period between 1972 and 1977 local Black-owned firms did not keep pace with the gains made nationally by Black-owned businesses.

15. In part as a result of the findings and recommendations of these reports, on November 3, 1981, the Dade County Commission, adopted Resolution No. R-1672-81, finding that past discriminatory practices have impaired the competitive position of Black owned and controlled businesses and that Blacks had not proportionately shared in Dade County's economic development. This resolution initiated a policy to promote increased participation of Black-owned businesses in Dade County by developing programs, including specific race conscious measures.

16. The findings and conclusions of Resolution No. R-1672-81 are summarized as follows:

a. There is a statistically significant disparity between the county's Black population and both the number of Black businesses within the County and those receiving county contracts;

b. The gross economic disparity between the Black community and the other communities in Dade County created frustrations in the Black community, which frustrations resulted in the May, 1980 civil disturbances;

c. *Past discriminatory practices* have, to some degree, adversely affected and impaired the competitive position of Black-owned business, resulting in a disproportionately small number of Black businesses in Dade County;

d. The causes of the statistical disparity involved the long-standing existence and maintenance of barriers impairing access by Black businesses to contracting opportunities, and did not relate to the lack of capable and qualified Black enterprises ready and willing to work;

e. Dade county has a compelling interest in stimulating the Black business community, which, on the basis of past experience, is not likely to benefit significantly in the absence of specific measures to increase its participation in county business;

f. Dade county has a compelling interest in promoting a sense of economic equality for all residents of the County; and

g. The Black population must be provided with the opportunity of owning and developing its own businesses.[7]

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[7] The entire resolution reads as follows:

WHEREAS, it has consistently been the policy of this Board to foster economic growth and business opportunities for its population and to promote the development of local businesses; and

WHEREAS, this Board believes that the favorable economic status and future growth prospects of Dade County are integrally linked to the economic and social conditions of the County's Black communities, residents and businesses; and

WHEREAS, this Board established the Black Business Participation Task Force and charged that Task Force with, among other things, investigating and assessing the present extent of Black

17. The net result of this action was that the commission initiated a policy at the highest level of county

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business activity within the County generally and specifically in relation to doing business with the County; and

WHEREAS, this Board hereby adopts the findings and conclusions of the Task Force; and

WHEREAS, that Task Force found a statistically significant disparity between the County's Black population and both the number of Black businesses within the County and those receiving County contracts; and

WHEREAS, this finding of the Task Force that Blacks have not proportionately shared in Dade County's economic development is in accordance with the findings and conclusions set forth in Black Owned Businesses in Metropolitan Miami, a Statistical Analysis of U.S. Census Data, prepared by Toney E. Crapp, Sr., Director, Business Development Division, Department of Trade and Commerce Development, City of Miami (December, 1980); An Economic Adjustment Plan for the Civil Disturbance Areas of the City of Miami and Dade County, prepared by Janus Associates (May, 1981); and the Report of the Governor's Dade County Citizens Committee (October 30, 1980); copies of which reports are appended hereto, and the findings and conclusions of which are hereby adopted by this Board; and

WHEREAS, these reports have found that the gross economic disparity between the Black community and the other communities in Dade County has greatly exacerbated the frustrations of the Black community, which frustrations resulted in the May, 1980 riots and loom as sources of continuing racial and ethnic tensions; and

WHEREAS, this Board recognizes the reality that past discriminatory practices have, to some degree, adversely affected our present economic system and have impaired the competitive position of businesses owned and controlled by Blacks so as to result in this disproportionately small amount of Black businesses; and

WHEREAS, the causes of this disparity are perceived by this Board as involving the long standing existence and maintenance of barriers impairing access by Black enterprises to contracting opportunities and not as relating to the lack of capable and qualified Black enterprises ready and willing to work; and

WHEREAS, Dade County greatly impacts the local economy and business development through its spending of revenue for various County projects and other needs; and

government of developing programs and measures to alleviate the problem of lack of participation of Blacks in the county's economic life. This policy was based on reliable, substantial information compiled by independent investigations. Specific race conscious measures were authorized and the county manager was directed to monitor such programs and to present periodic reports to the commission as to their efficacy and viability.

18. The race-conscious policy established by Resolution R-1672-81 was intended to potentially apply to all county contracts negotiated in the future. Specific implementation of this policy would await further action by the commission.

WHEREAS, Dade County has a compelling interest in stimulating the Black business community, a sector of the community sorely in need of economic stimulus but which, on the basis of past experience, is not expected to benefit significantly in the absence of specific measures to increase its participation in County business; and

WHEREAS, this County has a compelling interest in promoting a sense of economic equality for all residents of the County; and

WHEREAS, this Board believes that in order to effectively combat the unemployment and lack of economic participation of the Black community, the Black population must be provided with the opportunity of owning and developing their own businesses,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA:

Section 1. This Board hereby adopts the policy of developing programs and measures to alleviate the problem of lack of participation of Blacks in the County's economic life and to stimulate the local Black economy, including specific race conscious measures.

Section 2. Any program or procedure established pursuant to Section 1 above, shall continue until its objectives are met and must maintain sufficient flexibility to be able to achieve its purpose while still remaining viable in terms of the needs of the County to transact its business.

Section 3. The County Manager shall monitor such programs and present periodic reports to the Board as to their efficacy and viability.

D.

19. Metropolitan Dade County government is a multi-billion dollar public concern that expends approximately 620 million dollars annually in outside contracting and enters into thousands of contracts with business enterprises both locally and nationally. These contracts range from inexpensive procurement contracts to multimillion dollar Metrorail transit station projects.

20. The Date County Metrorail system is a billion dollar project financed from federal, state and local funds. A total of forty-five major procurement and construction rail contracts have been awarded since the beginning of the project to September 30, 1982. The total dollar value of the forty-four construction and procurement rail contracts awarded amount to $440,831,569. By adding to the construction and procurement rail contracts, the Kaisar Transit Group subcontracts, bus facilities contracts, bus design contracts and the downtown component of Metrorail contracts, the total dollar amount expended on the Metrorail system to September 30, 1982 totals $581,358,287.

21. As of August 31, 1982 there were 1600 employees working on the entire Metrorail system. Over half of that workforce (approximately 53%) is comprised of minorities (36% Black, 17% Hispanic). Also, more than 20% of the Metrorail and related construction was being performed by minority contractors and subcontractors, including approximately 7% by Black contractors and subcontractors.

22. Twenty stations are presently planned for the Metrorail system. The Earlington Heights station is the last station to be bid and it is located within the Black community of Dade county. This station is classified as contract number N336R. Although it was originally scheduled to be bid as a six station package consisting of the Civic Center, Santa Clara, Allapattah, Overtown,

Culmer and Earlington Heights stations, it was later separated out of the package to maximize the opportunity for it to be built by a Black contractor.

23. When the majority of the contracts on the Metrorail were already awarded on a competitive basis, certain actions were taken by county officials following the adoption of Resolution No. R-1672-81 to apply race conscious measures to increase Black participation in the remaining Metrorail construction projects.

a. The County established a committee which became commonly known as the Transit Oversight Committee, which included, *inter alia*, between four and six county commissioners, the county manager and the transportation coordinator. The purpose of this committee was to meet periodically and review suggestions for the inclusion of race-conscious measures within contract specifications of each construction contract.

b. Various administrative orders were issued to increase the participation of Black businesses in county procurement and professional services contracts.

c. The county adopted a $10 million bond guarantee program in early 1982 to assist Black contractors and subcontractors in meeting the bonding requirements on Metrorail contracts.

24. Even before any final decision was made regarding the application of race-conscious measures to the Earlington Heights Station, the county was required by the federal government to adhere to certain minority business enterprise (MEB) participation standards established by the Urban Mass Transportation Administration (UMTA), and minority employment goals set by the United States Department of Labor (Labor). By the time this action commenced, the county's MBE program exceeded both UMTA's minority business enterprise and Labor's minority employment guidelines. In this regard, the county's affirmative action reports establish that

more than twenty percent of the Metrorail and related construction was being performed by minority contractors and subcontractors, including approximately seven percent by Black contractors and more than fifty percent of the employees employed in the construction were minorities, including thirty-six percent Black employees.

25. Regulations issued by the U.S. Department of Transportation pursuant to 49 U.S.C. § 1615 mandate that as a condition of federal funding, each Metrorail prime contract must contain provisions insuring that a percentage of each construction contract amount be awarded to minority business enterprises or MBE's. 49 C.F.R. Part 23 contains the following definitions pertinent to this case:

> a. "Affirmative action" means taking specific steps to eliminate discrimination and its effects, to ensure nondiscriminatory results and practices in the future, and to involve minority business enterprises fully in contracts and programs funded by the Department.
>
> b. "Joint venture" means an association of two or more businesses to carry out a single business enterprise for profit for which purpose they combine their property, capital, efforts, skills, and knowledge.
>
> c. "Minority" means a person who is a citizen or lawful permanent resident of the United States and who is:
>
> (a) Black (a person having origin in any of the black racial groups of Africa);
>
> (b) Hispanic (a person of Spanish or Portugese culture with origins in Mexico, South or Central America, or the Caribbean Islands, regardless of race);
>
> (c) Asian American (a person having origins in any of the original peoples of the Far East, South-

east Asia, the Indian subcontinent, or the Pacific Islands); or

(d) American Indian and Alaskan Native (a person having origins in any of the original peoples of North America.)

(e) Members of other groups, or other individuals, found to be economically and socially disadvantaged by the Small Business Administration under section 8(a) of the Small Business Act, as amended (15 U.S.C. 637(a)).

d. "minority business enterprise" or "MBE" means a small business concern defined pursuant to section 3 of the Small Business Act and implementing regulations, which is owned and controlled by one or more minorities or women. This definition applies only to financial assistance programs. For the purposes of this part, owned and controlled means a business:

(a) Which is at least 51 per centum owned by one or more minorities or women or, in the case of the publicly owned business at least 51 per centum of the stock which is owned by one or more minorities or women; and

(b) Whose management and daily business operations are controlled by one or more such individuals.

e. "Set-aside" means a technique which limits consideration of bids or proposals to those submitted by MBEs.

26. Federal regulations require that the recipient of funds from the U.S. Department of Transportation set goals that are practical and related to the potential for MBE participation in the funded project. 40 C.F.R. § 23.45(g). For the period commencing with the beginning of the Metrorail System projects and ending September 30, 1982, the county established an MBE participation goal of 16.5% of the total dollar value of all con-

tracts awarded. As of September 30, 1982 the actual MBE participation of 19.6% exceeded that goal.

27. On May 7, 1982, the county manager corresponded with the administrator of UMTA requesting technical advice as to the best contract procedure for assuring substantial minority participation in the contract for the Earlington Heights station. The county manager explained that barriers have existed in the past to contracting opportunities for Black enterprises and that a state of public exigency exists in Dade County which justified affording Black enterprises an opportunity for maximum participation in the Earlington Heights station project. The administrator responded on June 9, 1982 by stating that it was the federal government's intention to allow Dade County maximum local flexibility and decision making authority in the implementation of the county's MBE program. He stated that set-asides may be established when they are not prohibited by state or local law and when a grant recipient determines that they are necessary to meet MBE goals. He further explained that the set-aside may be done where at least three MBE firms with capabilities consistent with contract requirements exist so as to permit competition. Finally, he concluded that, "this authorization permits you to utilize whichever procurement procedure is appropriate to accomplish your goals in light of local conditions, i.e., noncompetitive negotiation, competitive negotiation or formal advertising, provided that the procedure selected is consistent with and does not violate state law or federal requirements relating to use of Federal funds or nondiscrimination."

E.

28. On July 20, 1982, the county adopted Ordinance No. 82-67. That ordinance required review of *all* proposed county construction contracts to determine whether the addition to bid specifications of race-conscious measures, including bid credits, goals and set-asides would foster

participation of Black contractors and subcontractors in the contract work. The ordinance was based on the findings contained in Resolution No. R-1672-81, together with the June, 1982, report of the United States Commission on Civil Rights entitled, "Confronting Racial Isolation in Miami," which was appended thereto, and concluding that Dade County had a compelling interest in stimulating the Black business community. The ordinance directed the county manager to establish an administrative procedure to review each county construction contract to determine whether inclusion of race conscious bid specifications would foster participation of qualified Black contractors, and whether it was feasible to establish a Black prime contractor set-aside and Black subcontractor participation goals. The ordinance contained several definitions of importance:

> a. "Black contractor and subcontractor" means a contracting or subcontracting business entity which is owned and controlled by one or more Blacks and has established a place of business in Dade County.
>
> b. "Owned and controlled" means a business which is at least 51 percentum owned by one or more Blacks, or, in the case of a publicly-owned business, at least 51 percentum of the stock of which is owned by one or more Blacks; and whose management and daily business operations are controlled by one or more such individuals.
>
> c. "Blacks" means a person who is a citizen or lawful permanent resident of the United States and who has origins in any of the Black racial groups of Africa.
>
> d. *Goals* when utilized, goals shall be based on estimates made prior to bid advertisement of the quantity and type of subcontracting opportunities provided by the project to be constructed and on the availability and capability of Black contractors and subcontractors to do such work. When goals are

utlized, the invitation for bid and bid documents shall require the apparent lower and qualified bidder prior to bid award to meet the goal or demonstrate that he made every reasonable effort to meet the goal and notwithstanding such effort were [sic] unable to do so. In the alternative, the bid documents may require such demonstration regarding the goal or efforts to meet it to be included by all bidders as part of their bid submission. The steps required to demonstrate every reasonable effort shall be specified in the invitation for bid and the bid documents.

e. *Set-asides.* A set-aside is the designation of a given contract for competition solely among Black contractors. Set-asides may only be utilized where prior to invitation for bid, it is determined that there are sufficient licensed Black contractors to afford effective competition for the contract. In each contract where set-asides are recommended, staff shall submit its recommendation and the basis therefor to the Board for its initial review and determination whether waiver of competitive bidding for such contract is in the best interest of the County.

29. By its terms, the county manager was directed to report to the commission annually on the total dollar amount of county construction contracts and the percentage thereof to be performed by Black contractors. The Black set-aside and goal provisions continue in effect until the commission determines otherwise.[8]

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[8] The ordinance provides in full:

WHEREAS, this Board has previously made the legislative finding in Resolution No. R-1672-81, adopted November 3, 1981, that Blacks have not proportionately shared in Dade County's economic development and has initiated a policy to promote increased participation of Black-owned businesses in County contracts; and

WHEREAS, such findings and the bases therefor as contained in said Resolution No. R-1672-81, a copy of which is attached hereto,

30. At the time it enacted the ordinance, the county commission adopted implementing administrative proce-

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are hereby adopted as the legislative findings on which this Ordinance is based; and

WHEREAS, the above findings are in accordance with the findings and conclusions of the June 1982 report of the United States Commission on Civil Rights entitled, "Confronting Racial Isolation in Miami", a copy of which is appended hereto; and

WHEREAS, the government of Metropolitan Dade County greatly impacts the local economy and business development through its spending of revenue for various County projects and other needs; and

WHEREAS, Dade County has a compelling interest in stimulating the Black business community, a sector of the County sorely in need of economic stimulus but which, on the basis of past experience, is not expected to benefit significantly in the absence of specific race-conscious measures to increase its participation in County contracts.

NOW, THEREFORE, BE IT OBTAINED BY THE BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA:

Section 1. Article II of Chapter 10 of the Code of Metropolitan Dade County, Florida, is amended by adding the following new section thereto:

Sec. 10-38. *Procedure to increase participation of Black contractors and subcontractors in county contracts.*

(a) The foregoing recitations are hereby incorporated and adopted herein and made a part of this Ordinance.

(b) Except where federal or state law or regulations mandate to the contrary, the provisions of this Section shall be applicable to all construction contracts funded in whole or in part by county funds.

(c) (1) "Black contractor and subcontractor" means a contracting or subcontracting business entity which is owned and controlled by one or more Blacks and has established a place of business in Dade County.

(2) "Owned and controlled" means a business which is at least 51 percentum owned by one or more Blacks, or, in the case of a publicly-owned business, at least 51 percentum of the stock of which is owned by one or more Blacks; and whose management and daily business operations are controlled by one or more such individuals.

dures. The essential provisions of the administrative procedure are summarized as follows:

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(3) "Black" means a person who is a citizen or lawful permanent resident of the United States and who has origins in any of the Black racial groups of Africa.

(d) The County Manager shall establish an administrative procedure for the review of each proposed County construction contract to determine whether the inclusion of race-conscious measures in the bid specifications will foster participation of qualified Black contractors and subcontractors in the contract work. Such race-conscious measures may include goals for Black contractor and subcontractor particpation and set-asides.

(1) *Goals.* When utilized, goals shall be based on estimates made prior to bid advertisement of the quantity and type of subcontracting opportunities provided by the project to be constructed and on the availability and capability of Black contractors and subcontractors to do such work. When goals are utilized, the invitation for bid and bid documents shall require the apparent lower and qualified bidder prior to bid award to meet the goal or demonstrate that he made every reasonable effort to meet the goal and notwithstanding such effort were unable to do so. In the alternative, the bid documents may require such demonstration regarding the goal or efforts to meet it to be included by all bidders as part of their bid submission. The steps required to demonstrate every reasonable effort shall be specified in the invitation for bid and the bid documents.

(2) *Set-asides.* A set-aside is the designation of a given contract for competition solely among Black contractors. Set-asides may only be utilized where prior to invitation for bid, it is determined that there are sufficient licensed Black contractors to afford effective competition for the contract. In each contract where set-asides are recommended, staff shall submit its recommendation and the basis therefor to the Board for its initial review and determination whether waiver of competitive bidding for such contract is in the best interest of the County."

(e) The County Manager shall annually report to the Board on the total dollar amount of County construction contracts awarded that year and the percentage thereof to be performed by Black contractors and subcontractors. At such time, the Board shall determine whether to continue in effect the ad-

a. Each department is charged with the responsibility of submitting its recommendations concerning

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ministrative procedure for utilization of race-conscious measures authorized by this Ordinance.

Section 2. Section 10-34 of the Code of Metropolitan Dade County, Florida, is hereby amended as follows:

Sec. 10-34. Listing of subcontractors not required; exceptions.

Except for contracts for procurement or construction of all or any part of stage I of the rapid transit system, *construction contracts where race-conscious measures have been included in the bid specifications to foster participation of Black contractors or subcontractors,* or where federal or state law or regulations mandate to the contrary, no prime contractor submitting a bid for a project for which bids have been solicited by the legal entities to which this article applies shall be required to list thereon the names of any subcontractors it desires to be employed in connection with the subject project.

Section 3. Section 25A-4 of the Code of Metropolitan Dade County, Florida is hereby amended by adding the following paragraph at the end of subparagraph (b) of said section:

For all construction contracts, the trust shall comply with the provisions of Section 10-38 of the County Code and the administrative procedures adopted pursuant to said section.

Section 4. Section 32A-1 of the Code of Metropolitan Dade County, Florida, is hereby amended by adding the following after the last sentence of said action:

For all construction contracts, the authority shall comply with the provisions of Section 10-38 of the County Code and the administrative procedures adopted pursuant to said section.

Section 5. If any section, subsection, sentence, clause or provision of this ordinance is held invalid, the remainder of this ordinance shall not be affected by such invalidity.

Section 6. It is the intention of the Board of County Commissioners, and it is hereby ordained that the provisions of this ordinance shall become and be made a part of the Code of Metropolitan Dade County, Florida. The sections of this ordinance may be renumbered or relettered to accomplish such intention, and the word "ordinance" may be changed to "section", "article", or other appropriate word.

Section 7. This ordinance shall become effective ten (10) days after the date of its enactment.

Black set-asides and goals on each construction project under its jurisdiction;

b. A three member contract review committee comprised of county officials is charged with the responsibility of reviewing the Departmental recommendations and submitting a final recommendation on Black set-asides and goals to the county commission for final action;

c. Black subcontractor goals are to be based on "the greatest potential for Black subcontractor participation" and . . . "shall relate to the potential availability of Black-owned firms in the required field of expertise.";

d. Availability of Black subcontractors should include "all Black-owned firms with places of business within the Dade County geographic area";

e. Black set-asides shall be considered where there exists at least three Black prime contractors with the capabilities consistent with the contract requirements;

f. A Black prime contractor can be under contract for up to three set-asides within any one year period, but no more than one set-aside at a time;

g. Prior to implementation of a Black set-aside, the county commission is to make findings that the Black set-aside is "in the best interest of the County in order to waive formal bid procedures."; and

h. Bid procedures limiting bids to Black prime contractors would be implemented.[9]

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[9] These regulations provide:

1. DEPARTMENT RESPONSIBILITIES

1.01 All departments (including the Public Health Trust and the Miami-Dade Water and Sewer Authority) with funds budgeted for capital improvement projects are to develop a record keeping system which will include the dollar value of all construction contracts anticipated, a goal for Black participa-

31. On July 21, 1982, pursuant to competitive negotiation procedures, formal proposals were received and

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tion for the fiscal year, and the dollar value of contracts awarded by minority classification.

1.02 Prior to the completion of contract specifications for each capital project, each department, in conjunction with the consultant project manager, if engaged, will analyze the trades certifications required for each project. After considering the number and types of Black-owned firms likely to be available to participate in the contract, the goals of the department, and a suggestion as to the type of race-conscious measures which could be provided within the contract work are to be developed.

1.03 Suggested actions shall be for (a) establishment of subcontractor goals, (b) set-asides for contractors, (c) bid credit, and (d) no race-conscious requirements.

1.04 Each project is to be submitted to a Contract Review Committee for action and recommendation to the Board of County Commissioners.

2. CONTRACT REVIEW COMMITTEE

2.01 A three (3) member Contract Review Committee comprised of an Assistant County Manager, the Capital Improvements Coordinator and the Affirmative Action Coordinator is created. Staff to the Committee will be provided by a Compliance Office included within the Affirmative Action Division.

2.02 The Committee is to meet monthly or sooner, as necessary, for the purpose of reviewing suggestions for the inclusion of race-conscious measures within contract specifications of each construction project.

2.03 Suggested race-conscious actions are to originate by the County project manager for the construction project and the consultant project manager, if commissioner.

2.04 Projects are to be submitted to the Contract Review Committee prior to preparation of the contract specifications.

2.05 The Contract Review Committee, after considering the number of anticipated subcontractors likely to be employed on the job, will recommended at what point the subcontractors will be listed.

2.06 Following review by the Contract Review Committee, a recommendation is to be submitted to the Board of County

opened for the selection of a prime contractor to construct the county's Metrorail Earlington Heights Sta-

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Commissioners for action, together with the request for advisement.

2.07 Recommendations for set-aside projects require a waiver of formal competitive bids by the Board of County Commissioners.

3. CERTIFICATION

3.01 All firms participating in the Black Contractors and Subcontractors Program will be certified as Black firms.

3.02 Certification records will be maintained by the Contract Compliance Office within the Dade County Affirmative Action Division.

3.03 Assistance in the certification process will be provided by authorized community-based organizations under contract with Dade County.

3.04 Applications for certification will be on standard forms and will include, but will not be limited to, primary business location, evidence of ownership, operation, experience, and the adequacy of the firms.

3.05 Appeals of denials of certification can be made to the Contract Review Committee.

3.06 Certification of all firms will be updated annually.

3.07 Certification of each firm shall be completed prior to the award of any contract under the Black Contractors Program.

3.08 A concentrated, public advertising campaign by trade certification area will be undertaken to encourage certification.

4. SUBCONTRACTOR GOALS

4.01 Percentage goals for the dollar value of subcontractor work are to be considered when the review of the proposed contract indicates the greatest potential for Black subcontractor participation.

4.02 Goals shall relate to the potential availability of Black-owned firms in the required field of expertise.

4.03 Availability should include all Black-owned firms with places of business [that] are within the Dade County geographic area.

[Continued]

tion, contract no. N336R. Peter Kiewit Sons' Company, a non-Black prime contractor, tendered the lowest bid of $6,796,520. This low bid was more than two million dollars lower than the next lowest bid of $9,077,316.05, which was submitted by Thacker Construction Co., a Black prime contractor. Thereafter, on August 3, 1982, the county manager informally rejected both bids because: (1) the bids exceeded the county engineer's estimate;[10] and (2) the bidding process had been compromised by public disclosure of the proposed prices submitted and by the two bidders obtaining copies of each others' proposals, thereby rendering it impossible to con-

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[9] [Continued]

4.04 When goals are included with the contract of the prime contractor, bidders shall use good faith efforts to meet the goals.

4.05 Lack of good faith efforts will make the prime contractor's bid ineligible for award and not responsive.

4.06 A prime contractor may include the subpart of the volume of value of a joint venture of a certified subcontractor towards the contract goal.

5. SET-ASIDES

5.01 Contracts for set-asides shall be considered in those contracts when at least three (3) certified prime contractors with the capabilities consistent with the contract requirements exist.

5.02 A prime contractor can be under contract for only one (1) set-aside contract at a time, and no more than three (3) within any one (1) year period.

5.03 Prior to the advertising for set-aside contracts, the Board of County Commissioners is to make findings as to the proposed set-aside contract in the best interest of the County and waiving formal bid procedures.

5.04 Bid procedures limiting competitive bids to Black certified firms will be implemented.

6. BID CREDIT

6.01 Implementation of bid credit will not be done at this time.

[10] The county engineer had estimated that the contract should not exceed $6,060,140.

clude the bid negotiations under applicable federal regulations. The county manager thereafter proposed to the commission that the re-bid of the Earlington Heights station be subject to the requirements of the recently enacted race-conscious policy set forth in Ordinance No. 82-67 and the administrative procedures enacted pursuant to that ordinance.

32. In accordance with the administrative procedures now in effect, the contract review committee recommended to the county manager that the commission waive the use of formal competitive bids, and set-aside the Earlington Heights contract for competitive bidding exclusively among certified Black-owned firms along with the inclusion of a fifty percent Black subcontractor participation goal. The committee specifically recommended a set-aside because there were sufficient licensed Black contractors with an established place of business in Dade County possessing the financial and technical capabilities to act as a prime contractor on the project. In addition, a goal of involving Black subcontractors in fifty percent of the dollar value of the contract work was recommended based upon a consideration of the availability of Black subcontractors for each sub-trade item of the contract work and the technical and financial capability of those firms given the job size, bonding and working capital requirements.

33. On October 5, 1982, the commission adopted Resolution No. R-1350-82, which accepted the contract review committee's recommendations and mandated that race conscious measures be applied to the Earlington Heights Station. The commission noted that the Earlington Heights Station is the last Metrorail station to be bid and is located in the Black community. The commission specifically found that the:

> ". . . use of both a set aside and a goal on this contract will contribute towards eliminating the marked statistical disparity, noted in this Board's prior leg-

> islation, between the percentage of overall Black business participation in county contracts and the percentage of Dade County's population which is Black . . ."

The resolution found that it was in the best interest of the county to waive formal competitive bidding procedures and authorized setting aside this contract for competition solely among Black-owned prime contractors. The resolution also approved the fifty percent subcontractor goal.[11]

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[11] The entire resolution reads:

WHEREAS, this Board on November 3, 1981, adopted Resolution No. R-1672-81, finding that Blacks have not proportionately shared in Dade County's economic development and setting forth a policy to promote increased Black business participation in County business; and

WHEREAS, this Board on July 20, 1982, enacted Ordinance No. 82-67 which requires review of proposed county construction contracts to determine whether the addition to bid specifications of race conscious measures will foster participation of Black contractors and subcontractors in the contract work; and

WHEREAS, pursuant thereto the County Manager has created a contract review committee to review each construction contract prior to advertisement and to make recommendations thereon to this Board; and

WHEREAS, the committee has reviewed the Metrorail Earlington Heights Station contract together with the data and suggestions submitted by the Dade County Transportation Administration; and

WHEREAS, the committee has determined that there are sufficient licensed Black general contractors to afford effective competition for the station contract were the contract set aside for competition solely among Black contractors, and based thereon has recommended use of a set-aside on this contract; and

WHEREAS, in addition thereto, the committee has estimated the quantity and type of subcontracting opportunities provided by the contract and the availability and capability of Black contractors and subcontractors to do such work and based thereon has recommended a goal of fifty percent (50%) of the dollar value of the contract to be subcontracted to Black contractors; and

WHEREAS, Earlington Heights is the last of the 20 Metrorail stations to be bid and is located within the Black community of Dade County; and

WHEREAS, increased participation of Black contractors and subcontractors on this contract will have a substantial impact in the community to be served by this station both in terms of the credibility of the County's efforts to involve Black-owned businesses in the economic growth of this County and in terms of greater employment opportunities for members of such community; and

WHEREAS, this Board specifically finds and determines as a matter of fact that the use of both a set aside and a goal on this contract will contribute towards eliminating the marked statistical disparity, noted in this Board's prior legislation, between the percentage of overall Black business participation in County contracts and the percentage of Dade County's population which is Black; and

WHEREAS, this Board further finds that the use of both a set aside and a goal will help to alleviate unemployment and stimulate the Black business community, a sector of Dade County's economy which is sorely in need of economic stimulus, but which on the basis of past experience cannot be expected to receive any significant amount of the public funds to be expended on this contract in the absence of such race conscious measures,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, that:

1. Resolution No. 4-1672-81[sic] and Ordinance No. 82-67, together with the findings contained therein, and the documents and reports attached thereto, and the foregoing recitations are hereby incorporated and adopted as the legislative findings of this Board and are made a part of this resolution.

2. The recommendations of the contract review committee are accepted by this Board.

3. This Board finds that it is in the best interests of Dade County to waive formal competitive bidding procedures for the Earlington Heights Metrorail Station contract, and authorizes the set aside of such contract for competition solely among Black contractors, formal bidding being waived in this instance pursuant to Section 4.03(D) of the Home Rule Charter by two-thirds (2/3) vote of the Board members present.

4. In addition to the set aside, a goal of 50% of the dollar value of the contract work for Black subcontractors is adopted on this project.

34. On October 8, 1982, the county issued its advance notice to bidders on the Earlington Heights Station. This notice stated that "Black" means a person who is a citizen or a lawful permanent resident of the United States and who has origins in any of the Black racial groups of Africa. In compliance with the county's recently enacted race-conscious policy, competition was limited to Black prime contractors exclusively. The closing date for submission and the opening of bids on the Earlington Heights project was November 17, 1982.

35. Two bids were received pursuant to the notice but they remained sealed since the Court issued its restraining order before the scheduled time the bids were to be opened and announced.

F.

36. There is no evidence that the present Metropolitan Dade County government has imposed any racial barriers to Black contractors in obtaining county licenses. To the contrary, county government has a formal equal opportunity services division in its Office of Transportation. This office is charged with meeting federal employment and MBE guidelines on county projects and vigorously seeks to increase minority involvement in county contracting. There is no evidence before the Court that the current Dade County government itself ever engaged in any discriminatory practices against Blacks or any other members of a minority group.

37. Before any race-conscious measures involving Black contractor set-asides and Black subcontractor goals were applied, the county, through the application of federal minority business participation guidelines, had established MBE requirements of forty percent to forty-five percent on the construction of Metrorail stations in Black neighborhoods. While Blacks were represented on the overall Metrorail project in numbers greater than their proportion to the county's population in general,

the county desired to make extraordinary efforts to involve Black contractors in the completion of the north leg of the system located in large part in the local Black community. The Earlington Heights station became the focal point for applying the race conscious measures established by the county.

38. The race-conscious program established by Ordinance 82-67 and applied to the Earlington Heights station in Resolution No. R-1350-82 was designed expressly to impact Black contractors only. It was not designed to assist members of any other minority group.

39. The ultimate objective of the county's race-conscious program was to remedy the present continuing effects of past racial discrimination and to take affirmative steps to halt the perpetuation of the vicious cycle in which fledgling Black contractors were unable to overcome past discrimination to compete equally with White contractors. The program's specific purpose was to remedy the disabling effects of discrimination that exist in county contracting.

40. For the most part, the various studies and reports that have been introduced into evidence, and that describe the plight of Dade County's Black residents, attribute the low rate of participation of Black-owned businesses, including Black contractors and subcontractors, in contracts awarded by Dade County, to the continuing effects of "societal discrimination"—i.e., lack of capitalization, inadequate housing, poor general education and vocational training, lack of self-esteem, and lack of appropriate role models. The studies and the statistical data that they incorporate do conclusively establish that although more than seventeen percent of Dade County's population is Black, only one percent (or less) of Dade County's construction contracts are performed by Black contractors and subcontractors.

41. Although "societal discrimination" may be the ultimate cause of the extremely low percentage of Black

contractors doing business in Dade County, there is evidence in this record from which the Court can find *identified discrimination* against Dade County Black contractors at some point prior to the county's present affirmative action program. In reaching this conclusion the Court has relied on the following point:

a. The record indicates that less than one percent of Dade County contractors are Black even though the overall Black population exceeds seventeen percent. The only plausible explanation for this statistical disparity is that Black contractors in Dade County continue to suffer from the present effects of past discrimination against them.

b. The construction industry nationally has been particularly slow to open itself to racial minorities.[12] "[R]acial discrimination in the construction trades on racial grounds has been found so often by the courts as to make it a proper subject for judicial notice." *Local Union No. 35 etc. v. City of Hartford*, 625 F.2d 416, 422 (2d Cir. 1980), *cert. denied*, 453 U.S. 913, 101 S.Ct. 3148, 69 L.Ed.2d 997 (1981).[13]

c. The extremely low percentage of county contracts awarded to Blacks in the past.[14] While to a certain extent this is explainable by the low percentage of Black contractors available in the area, to a larger extent, this

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[12] *Associated General Contractors v. Altshuler*, 490 F.2d 9, 12 (1st Cir. 1973), cert. denied, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974).

[13] Citing *United Steelworkers v. Weber*, 443 U.S. 193, 198 n. 1, 99 S.Ct. 2721, 2725, 2725 n. 1, 61 L.Ed.2d 480 (1979). Accord, *Associated General Contractors v. Altshuler*, supra. Even at this date the plaintiff, general contractors, does not have a single Black member (a Black firm had been invited but had not accepted at the time of the final hearing).

[14] For the years 1977, 1978, 1979 and 1980, the number of construction contracts awarded to Black contractors was considered "negligible". Testimony of Charles Blowers at 357.

low percentage is a present effect of past discrimination against Black contractors.

42. *Since there are no Black price contractors in Dade* County qualified to perform major county construction projects, the county therefore solicited and recruited major, well-established Black prime contractors from outside Dade County and the State of Florida in order to create a pool of Black prime contractor bidders. In order to fulfill the eligibility requirements to bid on a county contract, each outside contractor had to maintain a place of business in Dade County.[15]

43. The county's race conscious policy has no express expiration date. It appears, however, that it was the intention of its drafters to have the program expire when Black contractors receive county contracts in proportion to their representation in the overall county population.[16]

44. Plaintiff, the general contractors, comprised of White and other non-Black prime contractors, has jointly sponsored with the predominately Black Laborers Union a scholarship and grant program for the members of the Laborers Union and their sons and daughters. Over a fifteen year period, this program financed by contributions from White and other non-Black contractors, resulted in the distribution of more than $700,000.00 in scholarships to predominately Black students and more than $200,000.00 in direct grants to four colleges and universities, including predominately Black Florida A & M University, Bethune-Cookman College and Florida Memorial College.

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[15] Intervenor Thacker Construction Company has established a place of business in Dade County.

[16] Ordinance 82-67 provides that the county manager make annual reports to the county commission on the percentage of the total dollar amount of county construction contracts performed by Black contractors. Conceivably, the commission could revise the race conscious program to reflect the latest statistical data available.

45. While non-Black businesses could have participated in the Earlington Heights project as part of a joint venture and, in fact one of the bidders appears to be a joint venture, a joint venture would require that the Black-owned firm have at least fifty-one percent control over the project.

46. Plaintiffs did not attempt to formally challenge the county's race conscious policy while it was being developed and prior to its adoption by the county commission. Protest at any administrative level of the government would have been ineffectual in any event.

47. Requiring that race be taken into account in the award of a contract has an effect on the contract price. Obtaining the contract at the lowest possible dollar amount need not be the exclusive goal of government contracting. Various constraints may effect the final contract price that have nothing whatsoever to do with race.

48. After reviewing all of the evidence presented in the various reports and studies introduced into evidence, the Court expressly finds that the economic condition of the Black community in Dade County is serious. The county manager's description that a state of public exigency exists in Dade County is not unfounded.

IV.

In accordance with the foregoing findings of fact, the Court makes its conclusions of law:

A.

1. The Court's first obligation is to examine and decide plaintiffs' pendent claims since a federal court should not decide federal constitutional questions where a dispositive non-constitutional ground is available. *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). This admonition is particularly appropriate in this case since it was recently held in another case simi-

lar to this one that the court there abused its discretion by reaching the federal constitutional issue where a state law claim was dispositive of the case. See *Schmidt v. Oakland Unified School District*, 662 F.2d 550 (9th Cir. 1981); *vacated and remanded*, —— U.S. ——, 102 S.Ct. 2612, 73 L.Ed.2d 245 (1982). Accordingly, the Court turns first to Plaintiffs' two pendent claims contained in the complaint. Taking them in the reverse order in which they are presented, the complaint alleges that the county violated its own competitive bid procedure mandated by local law when it enacted its race-conscious policy. Additionally, the complaint alleges that the county's race-conscious policy violated the plaintiffs' rights under the Florida Constitution. It is the opinion of the Court that the pendent claims are not dispositive of the federal constitutional issues presented by this case.

(1)

2. The plaintiffs contend that the county's waiver of formal competitive bidding procedures on the ground that the waiver is in the best interests of Dade County violates the Dade County Home Rule Charter[17]. Section 4.03(D) of the Dade County Home Rule Charter provides:

> Contracts for public improvements and purchases of supplies, materials, and services other than professional shall be made *whenever practical* on the basis of specifications and competitive bids. Formal sealed bids shall be secured for all such contracts and purchases when the transaction involves more than the minimum amount established by the Board of County Commissioners by ordinance. The transac-

[17] The Florida Constitution grants special home rule powers to Metropolitan Dade County. See Fla.Const. Art. VIII § 6 (1968). Pursuant to that constitutional provision, the electorate of Dade County adopted a Home Rule Charter which contains special municipal powers not normally available to county government.

tion shall be evidenced by written contract submitted and approved by the Board. The Board, upon written recommendation of the Manager, *may by resolution adopted by two thirds vote of the members present, waive competitive bidding when it finds this to be in the best interest of the county.* (emphasis added)

3. It is apparent from the plain language contained in § 4.03(D) that the county has the necessary discretion to waive the competitive bidding requirements upon a two thirds vote of the members present. This was done in this case. In Florida, the general rule is that "a public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree." *Liberty County v. Baxter's Asphalt and Concrete, Inc.*, 421 So.2d 505 (Fla. 1982). The county determined to waive competitive bid procedures and to apply race-conscious criteria in order to eliminate the disparity in the number of county contracts received by Black-owned businesses. Based upon the findings contained in the enacting ordinance and resolution and confirmed in the findings made by this Court, the waiver was clearly within the discretion of the county. Accordingly, plaintiff's contention otherwise is without merit.[18]

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[18] Plaintiffs also claim that Chapter 11A of the Code of Metropolitan Dade County expressly prohibits the County from enacting race-conscious remedies. Chapter 11A by its terms relates only to the areas of employment and housing and, therefore, is inapplicable to the subject ordinance and resolution which fosters Black business participation in county construction contracts. Plaintiffs additionally argue that Section 11A-22(h) of the County Code prohibits affirmative action programs like the program in the instant case. Section 11A-22(h) reads:

"(h) Nothing contained in this article shall . . . require any employer . . . to grant preferential treatment . . . on

(2)

4. Plaintiffs second pendent claim parallels their federal constitutional claim since the Florida courts have held that the equal protection and due process provisions of the Florida Constitution confer the same guarantees and impose the same standards as the equivalent provisions of the United States Constitution. See *Florida Real Estate Commission v. McGregor*, 336 So.2d 1156 (Fla. 1976) and *Florida Canners Association v. Department of Citrus*, 371 So.2d 503, 513 (Fla. 2d DCA 1979), *affirmed*, 406 So.2d 1079 (Fla. 1982). Accordingly, resolution of this issue is entirely dependent upon the outcome of plaintiffs' federal claim and will be controlled by the Court's decision in part IV-B of this opinion.[19]

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account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number of percentage of persons of such race . . . in any community . . . ."

This section is taken verbatim from § 703(j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2(j). In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), the employer argued that statistics which compare the racial composition of an employer's work force to the composition of the population are prohibited by Section 703(j). The Supreme Court expressly rejected this argument holding:

> Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population." *Id.* 431 U.S., at 339, n. 20, 97 S.Ct. at 1856-57.

Accordingly, the Court concludes that Chapter 11A is inapposite and that Section 11A-22(h) does not preclude consideration of population characteristics in determining discrimination.

[19] In light of the Court's ruling that the set-aside is impermissible under the Federal Constitution while the goals provision is acceptable, the Court also concludes that the same result would follow under the Florida Constitution.

B.

5. At least since 1954 when the Supreme Court issued *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the elimination of all vestiges of racial discrimination in our society has been a recognized goal of all branches and levels of government in the United States. While the removal of purposeful discrimination has largely been accomplished, the struggle to achieve complete equality has not yet been realized. Government therefore has sought to advance equality in American society by using affirmative action programs which employ racial classifications and numerical goals or quotas in the distribution of benefits and opportunities. Constitutional problems arise when courts are compelled to gauge the extent to which government may go in applying affirmative action plans to rectify the present effects of past discrimination. Although the Supreme Court has issued a trilogy of cases in recent years on this issue,[20] no clear guidance has emerged in this tangled area of the law. Until some definitive resolution of the reverse discrimination dilemma is forthcoming, the legal and scholarly debate will continue.[21]

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[20] *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979); and *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980).

[21] A number of law review articles have been published since *Bakke* that discuss the reverse discrimination dilemma and affirmative action plans; Van Benthuysen, Minority Business Enterprise Set-Aside: The Reverse Discrimination Challenge, 45 Alb.L.Rev. 1139 (1981); Bohrer, Bakke, Weber and Fullilove: Benign Discrimination and Congressional Power To Enforce the Fourteenth Amendment, 56 Ind.L.J. 473 (1981). Richards, Equal Protection and Racial Quotas: Where does *Fullilove v. Klutznick* Leave Us?, 33 Baylor L.Rev. 601 (1981). The Constitutionality of Affirmative Action in Public Employment: Judicial Deference to Certain Politically Responsible Bodies, 67 Va.L.Rev. 1235 (1981). Choper, The Constitutionality of Affirmative Action, Views from the Su-

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6. In this case, the plaintiffs are challenging the legality of a system of race-conscious ordinances, resolutions and procedures which permit the county to set-aside a construction contract for competition exclusively among Black contractors and to establish Black subcontractor goals on county construction contracts. It is the position of the plaintiffs that the county is prohibited by the Fourteenth Amendment from applying its race-consious procedures to the Earlington Heights contract in such a way that plaintiffs are barred or otherwise restricted from bidding on the contract solely because of their race.

The Fourteenth Amendment prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." The equal protection clause means essentially that while the state may of necessity, classify people and activities in order to promote the general welfare, those persons and activities which are similarly situated must be similarly treated by law.[22] Neither a state nor one of its subdivisions[23] may employ a racial

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preme Court, 70 Ky.L.J. 1 (1981-82); Belton, Discrimination and Affirmative Action, 59 N.C.L.Rev. 531 (1981); Lavinsky, Affirmative Action Trilogy and Benign Racial Classifications—Evolving Law in Need of Standards, 27 Wayne L.Rev. 1 (1980); Baldwin and Nagan, Board of Regents v. Bakke; The All-American Dilemma Revisited, 30 U.Fla.L.Rev. (1978); Fullilove And The Minority Set-Aside: In Search of An Affirmative Action Rationale, 29 Emory L.J. 1127 (1980).

[22] *F.S. Rogster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920); G. Gunther, Constitutional Law Cases and Materials 678 (10th ed. 1980); J. Nowak, R. Rotunda, V.J. Young, Constitutional Law (1978); Van Benthysen, Minority Business Enterprise Set-Aside: The Reverse Discrimination Challenge, 45 Alb.L.Rev. 1139, 1142 (1981).

[23] Counties and county officers are instrumentalities of state power for purposes of the equal protection clause. *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *Small v. Hudson*, 322 F.Supp. 519 (M.D. Fla. 1971). Accord, *Avery v. Midland County, Tex.*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968).

classification in the imposition of rights and responsibilities on its residents or in the distribution of benefits without inviting scrutiny by the courts as to the constitutionality of these classifications. Two recent notable cases out of the Supreme Court provide some guidance in resolving the important issue of whether the application of a benign racial classification is justified in this instance.

7. The constitutionality of a state's affirmative action plan mandating preferences on the basis of racial or ethnic origin was first addressed by the U.S. Supreme Court in *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).[24] The challenge was to an admissions program adopted by the medical school of the University of California at Davis. Under that program, sixteen of the one hundred places were specifically reserved for minority applicants. Bakke, a white male whose application had been rejected, alleged that he would have been accepted but for the Davis affirmative action plan. He argued that the school had violated Title VI of the Civil Rights Act of 1964[25] and the equal protection clause of the Fourteenth Amendment.

Five Justices, concluding that an action violates Title VI only if a similar state action would violate equal protection, reached the constitutional question. See *Bakke*, 438 U.S. at 287, 98 S.Ct. at 2746 (Powell, J.), 328, 355,

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[24] This opinion has been the subject of a number of law review comments. See 32 Ark.L.Rev. 499 (1978); 92 Harv.L.Rev. 131 (1978); 32 Oklahoma Law Rev. 119 (1979); 54 Washington Law Rev. 373 (1979); 58 Or.L.Rev. 311 (1979).

[25] This provision states:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The applicability of this statute is not an issue in this case.

98 S.Ct. 2676, 2781 (Brennan, White, Marshall, Blackmun, JJ.). As to the equal protection question, Justice Powell expressed the view that all racial classifications which exclude individuals from the enjoyment of some opportunity, including those classifications operating in favor of minorities, call for strict scrutiny. Applying that standard, he concluded that a state university has a compelling interest in attracting a diverse student body, but that the strict racial quota imposed by the Davis plan was not necessary to the achievement of that goal. He held, therefore, that the Davis program violated equal protection. Justice Powell then stated, however, that in his view race may be considered as one factor in an admissions program aimed at achieving student diversity.

Justices Brennan, White, Marshall, and Blackmun joined in an opinion concurring and dissenting. On the equal protection question, they would have held that racial classifications designed to further remedial purposes were subject only to an intermediate level of scrutiny; i.e., the classification must be substantially related to an important governmental interest. They found the Davis plan substantially related to the important state interest in remedying the effects of past societal discrimination and, therefore, constitutional.[26]

Justice Stevens, concurring and dissenting, was joined by the Chief Justice and by Justices Stewart and Rehnquist. The opinion by Justice Stevens concluded that the Davis plan violated Title VI, and did not reach the equal protection issue.

Thus, a majority of five Justices held that a state university admissions program may not employ strict racial

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[26] This opinion did not articulate a precise test by which lower courts could be guided in the application of this intermediate level of scrutiny. These four justices approved both the Davis 16% quota in *Bakke* and the Congressional 10% set-aside in *Fullilove*. They found that both affirmative action plans were constitutionally acceptable.

quotas, one of the five reaching that decision on constitutional grounds and the other four on statutory grounds. A separate majority of five Justices, however, held that a state university admissions program may take race into account as one factor.[27]

8. In 1980 the Supreme Court revisted this issue in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980),[28] where the Court addressed the constitutionality of the minority business enterprise provision of the Public Works Employment Act of 1977.[29] 42 U.S.C. § 6705(f)(2). Under that provision, no federal grant for a local public works project may be made without assurance by the applicant that at least ten percent of the amount of the grant will be expended for minority business enterprises or MBE's. The implement-

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[27] The Court is indebted to Judge Fletcher of the Ninth Circuit for her succinct summaries of *Bakke* and *Fullilove* in *Schmidt v. Oakland Unified School District*, 662 F.2d 550 (9th Cir. 1981). Since Judge Fletcher's terse summaries of these important cases cannot easily be improved, they have been adopted with some modification for use in this opinion.

[28] Like the *Bakke* opinion, *Fullilove* has attracted considerable attention in the law reviews. A number of case comments have been written about it: e.g. 94 Harv.L.Rev. 125 (1980); 15 Suffolk U.Law. J. 306 (1981); 60 N.C.L.Rev. 681 (1982); 38 Wash. & Lee L.Rev. 1315 (1981).

[29] The legality of an all-private (no governmental entity was involved), voluntary, race-conscious affirmative action plan was discussed in *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979). The Court held that an affirmative action plan that was collectively bargained by an employer and a union and that reserved for Black employees 50 percent of the openings in an inplant craft training program until the percentage of Black craft workers in the plant was commensurate with the percentage of Blacks in the local labor force did not violate Title VI of the Civil Rights Act of 1964. No constitutional issues were implicated by the decision since the plan reviewed there did not involve state action and therefore the principles developed in that case have minimal significance to the issues raised in our case.

ing regulations made clear the administrative understanding that a waiver or partial waiver is justified to avoid subcontracting with an MBE at an unreasonable price, i.e., a price above competitive levels which cannot be attributed to the minority firm's attempt to cover costs inflated by the present effects of disadvantaged or discrimination. An aggrieved white contractor argued that the statutory provision violated equal protection.

The Chief Justice, in an opinion joined by Justices White and Powell, found the plan constitutional and approved the act. The plurality opinion concluded that Congress acted within its competence in seeking ways to end procurement practices that can perpetuate the effects of prior discrimination.

Although the Chief Justice emphasized that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees," 448 U.S. at 491, 100 S.Ct. at 2781, he considered several factors that tipped the balance in favor of the statute's constitutionality:

a. The statute was enacted by the Congress, a coequal branch of government, as a remedial measure with the objective of directing funds into the minority business community.

b. Congress had before it abundant evidence from which it could conclude that this remedial measure was necessary to eliminate the effects of prior discrimination that traditional government procurement practices tended to perpetuate.

c. The MBE plan envisioned by the statute allowed administrative waivers and exemptions that would absolve a grantee from compliance with the plan after making a good faith effort to achieve its objectives.

While the Chief Justice warned that the MBE statute "press[ed] the outer limits of Congressional authority,"

448 U.S. at 490, 100 S.Ct. at 2781, he concluded that it passed constitutional muster since it provided a reasonable assurance that application of racial or ethnic criteria would be limited to accomplishing the remedial objectives of Congress and that misapplications of the program will be promptly and adequately remedied administratively.

9. While the plurality opinion did not explicitly state what standard of review should be applied to benign racial or ethnic classifications,[30] Justice Powell wrote a concurring opinion in which he repeated his belief, first expressed in *Bakke*, that the strict scrutiny standard should be applied.

Justice Powell believes that a classification is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest. To impose a race-conscious remedy, two requirements must be met. First, the particular governmental body involved must have the authority (and capability) to act in response to *identified discrimination*. Second, the governmental body must make findings that demonstrate the existence of illegal discrimination. *Fullilove*, *supra* 448 U.S. at 498, 100 S.Ct. 2785 (Powell, J., concurring). The third part of the Powell test provides that the *means* selected by the governmental body be narrowly drawn to fulfill the purpose of the remedial measures taken.

Justice Powell maintains that there is a compelling governmental interest in eradicating the continuing effects of past discrimination. However, even a benign racial classification must be responsive to *identified discrimination*, that is, a more focused attempt to remedy

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[30] Benign discrimination means discrimination on the basis of race which is designed to benefit members of supposedly disadvantaged minority groups. It usually results in some degree of disentitlement for the nonpreferred members of the majority White race. G. Guntler, Constitutional Law Cases v. Materials, 678 (10th ed. 1980) [quoted in 45 Alb.L.J. at 1149-50].

the effects of past discrimination in one particular group or industry, not society at large. Justice Powell was quite clear that the general interest of remedying past *societal* discrimination could not justify the use of race-conscious measures.[31] Finally, once the governmental body proffers a compelling interest to support its reliance upon a racial classification, it must select a remedy narrowly drawn to fulfill its purpose. To survive strict judicial scrutiny, a race-conscious classification must be measured by this standard.

In reviewing the propriety of a race-conscious remedy, Justice Powell listed and approved several factors previously considered by the lower courts in making their determinations:

> (i) *the efficacy of alternative remedies, NAACP v. Allen*, 493 F.2d 614, 619 (CA5 1974); *Vulcan Society v. Civil Service Comm'n*, 490 F.2d 387, 398 (CA2 1973); (ii) *the planned duration of the remedy. Vulcan Society Inc. v. Civil Service Comm'n*, 490 F.2d at 399; *United States v. Wood, Wife [Wire], & Metal Lathers Local 46*, 471 F.2d 408, 414, n. 12 (CA2), cert. denied, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973), (iii) *the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force, Association Against Discrimination v. Bridgeport*, 594 F.2d 306, 311 (CA2 1979); *Boston Chapter NAACP v. Beecher*, 504 F.2d 1017, 1026-1027 (CA1

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[31] Justice Powell expanded on this thought in *Bakke*, 438 U.S. at 307, 98 S.Ct. at 2757 where he said:

> The State certainly has a legitimate and substantial interest in ameliorating or eliminating where feasible, the disabling effects of identified discrimination . . . . That goal was far more focused than the remedying of the effect of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past.

1974), cert. denied, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975); *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n*, 482 F. d 1333, 1341 (CA2 1972), cert. denied, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975); *Carter v. Gallagher*, 452 F.2d 315, 331 (CA8) (en banc), cert. denied, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 388 (1972), and (iv) *the availability of waiver provisions if the hiring plan could not be met, Associated General Contractors Inc. v. Altshuler*, 490 F.2d 9, 18-19 (CA1 1973), cert. denied, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974) (emphasis added) Ibid. 448 U.S. at 510-11, 100 S.Ct. at 2791.

A fifth factor was added by Justice Powell: the effect of the set-aside upon innocent third parties. 448 U.S. at 514, 100 S.Ct. at 2793.

10. After the Supreme Court decisions of Fullilove and Bakke,[32] some federal and state courts have applied the strict scrutiny standard in determiing the constitutionality of race-conscious remedies. See e.g. *Morgan v. O'Bryant*, 671 F.2d 23 (1st Cir. 1982) (applying strict scrutiny to uphold an affirmative action plan by a local school board directing teacher layoffs in such a way as to maintain the current percentage of black teachers and administrators); *M.C. West, Inc. v. Lewis*, 522 F.Supp. 338 (M.D. Tenn. 1981) (employing strict scrutiny in affirming MBE regulations promulgated by the U.S. De-

[32] Even before the *Fullilove* decision, the federal district courts applied the strict scrutiny standard in those cases which first challenged the 10% MBE set-aside of the PWEA enacted by Congress. See e.g. *Constructors Assoc. of Western PA. v. Kreps*, 441 F.Supp. 936 (W.D. Penn. 1977); affirmed 573 F.2d 811 (3rd Cir. 1978); *Ohio Contractors Ass'n v. Economic Development*, 452 F.Supp. 1013 (S.D. Ohio 1977; affirmed 580 F.2d 213 (6th Cir. 1978); *Carolinas Branch, Associated, Etc. v. Kreps*, 442 F.Supp. 392 (D. South Carolina 1977); *Fullilove v. Kreps*, 443 F.Supp. 253 (S.D.N.Y. 1977), affirmed, 584 F.2d 600 (2d Cir. 1978).

partment of Transportation); *Perini Corporation et al. v. Massachusetts Bay Transportation Authority, et al.*, No. 77-2340-MC (D.Mass. 1980) (using the strict scrutiny standard to conclude that the defendants had not made the requisite findings of illegal discrimination); *Central Alabama Paving, Inc. v. James*, 499 F.Supp. 629 (M.D.Ala. 1980) (applying strict scrutiny to invalidate MBE set-aside regulations promulgated by the U.S. Department of Transportation); *Arrington v. Associated General Contractors*, 403 So.2d 893 (Ala. 1981); *cert. denied*, 455 U.S. 913, 102 S.Ct. 1265, 71 S.Ct. 453 (1982) (utilizing the strict scrutiny standard to invalidate a municipal ordinance establishing an MBE requirement for city contracts on the grounds, *inter alia*, that the race-conscious remedy was not sufficiently narrow to comport with equal protection guarantees).

Other courts have refrained from adopting any express standard of scrutiny. See e.g. *Schmidt v. Oakland Unified School District*, 662 F.2d 550 (9th Cir. 1981), *vacated and remanded on other grounds*, —— U.S. ——, 102 S.Ct. 2612, 73 L.Ed.2d 245 (1982) (upholding the constitutionality of a plan requiring a general contractor bidding on a school construction project to use minority owned businesses for at least 25% of the dollar amount of the total bid); *Local Union No. 35 etc. v. City of Hartford*, 625 F.2d 416 (2d Cir. 1980), *cert. denied*, 453 U.S. 913, 101 S.Ct. 3148, 69 L.Ed.2d 997 (1981) (validating a municipal ordinance containing an affirmative action plan requiring a good faith effort to achieve at least a 15% level of minority and female employment); *Pettinaro Const. Co., Inc. v. Delaware Authority, etc.*, 500 F.Supp. 559 (D.Del., 1980) (applying "stringent standards" to deny a motion for summary judgment of plaintiff-contractor who was challenging a 15% minority set-aside goal).

11. Since the Supreme Court has not expressed a majority view on what level of scrutiny must be applied to

preferential racial quotas or numerical goals for minorities disadvantaged by the present effects of past discrimination, lower courts retain the authority to appropriately examine affirmative action programs involving benign discrimiation. It appears however that there is an evolving doctrine gradually developing in the federal courts that benign racial or ethnic classifications are subject to strict judicial scrutiny and may only be employed when necessary to accomplish a compelling governmental interest.

As our society gradually emerges from the dark shadows of great unequal treatment into the sunshine of true equality of opportunity regardless of race, the justification for affirmative action and the discrimination that necessarily results from affirmative action will disappear. While that point has not yet been reached, substantial progress has been made. As this nation strives towards its ultimate goal of racial equality, the courts must be increasingly vigilant of the remedies employed to reach that goal. The need for strict judicial scrutiny will increase, not lessen since the justification for benign racial classifications will eventually disappear. Accordingly, it is the judgment of this court that in order to prevail, the county's race-conscious policy must pass the test of strict scrutiny. If it fails to measure up to this exacting standard, it cannot be permitted to continue.[33]

(2)

12. Plaintiffs attack the county's race-conscious program on three fronts: (a) by questioning the county's competence to make findings in the area of race discrimination; (b) by challenging the adequacy of the rec-

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[33] As explained in part III-B(2) of this opinion, the set-aside fails under the strict scrutiny standard. The Court refrains from deciding whether the set-aside would pass constitutional muster under any lesser standard. The goals provision, of course, would be sustained under any lesser standard of scrutiny.

ord upon which the county made its findings of discrimination; and (b) by asserting that the race-conscious remedy imposed by the county is not carefully tailored to rectify the continuing effects of past unlawful discrimination.[34] The first two points can be disposed of without extended discussion. The third contention, however, will require extensive analysis.

(i)

Plaintiffs initially contend that the county commission has neither the authority nor the competence to make factual and legal determinations in the area of race discrimination. This argument is without merit since the county clearly has the authority to make the findings upon which its race-conscious policy was based.

Dade County is authorized by its Home Rule Charter, among other things, to:

> a. Conduct studies of county population, . . . facilities, resources, and needs and other factors which influence the county's development, and on the basis of such studies prepare such . . . reports . . . for the . . . economic . . . development of the county. Section 4.07.
>
> b. Make investigations of county affairs, inquire into the conduct, accounts, records, and transactions of any department or office of the county, and for these purposes require reports . . . . Section 1.01A (20).
>
> c. Prepare and enforce comprehensive plans for the development of the county. Section 1.01A(5).
>
> d. Use public funds for the purposes of promoting the development of the county . . . ." Section 1.01A (15).

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[34] The last contention is really one of the requisites of the strict scrutiny standard, See part III, post.

e. Provide and operate . . . public transportation systems." Section 1.01A(2).

f. Adopt such ordinances and resolutions as may be required in the exercise of its powers . . . ." Section 1.01A(22).

g. Perform any other acts consistent with law which are required by this Charter or which are in the common interest of the people of the county." Section 1.01A(23).

A county commission functions as a legislative body in making county policy and enacting local law.[35] Justice Powell's concern, expressed in *Bakke*, 438 U.S. at 309, 98 S.Ct. at 2758, that "isolated segments of our vast governmental structures are not competent to make . . . decisions . . . [involving the imposition of race-conscious remedies]," should not deter this Court from accepting the findings made by the county commission. Justice Powell was speaking about subordinate, mostly administrative bodies, that do not possess lawmaking powers, for example, a state university.[36] Here, the county commission is the duly elected legislative body of local government. Consequently, the Court concludes that the commission had the competence and the authority to determine that Blacks have not shared proportionately in the county's economic development, as well as the ability to enact a race-conscious program to remedy this situation.

(ii)

14. Plaintiffs next argue that the commission did not compile the necessary record that would justify the need

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[35] In Florida, county governments are granted a number of powers and duties by the State. See Fla.Stat.Ann. § 125.01 (West Supp. 1982) Dade County's Home Rule Charter, Fla.Const. Art. VIII § 6, gives the county commission of this county even greater powers not normally available under general law.

[36] The defendants in *Bakke* were, of course, the Regents of the University of California, an administrative agency without any legislative expertise.

for a race-conscious ordinance. At the time it enacted Ordinance 82-67 and Resolution R-1350-82, the commission had available to it various reports and studies described previously in this Court's findings of fact.

Contrary to Plaintiffs' contention, the information contained in these reports do provide a substantial basis for the actions taken by the county commission, including the implementation of race-conscious measures and the Court made a finding to this effect.[37] Indeed, plaintiffs do not even suggest what additional better information the commission could have relied on in making its findings that Blacks have not proportionately shared in the county's economic development.

(iii)

15. Thus far the Court has ruled that the county commission had the authority to act in response to identified discrimination and that it had an adequate record upon which to make findings that demonstrate the existence of identified discrimination. The next critical inquiry is whether the county's race-conscious program is a constitutionally appropriate means of serving the compelling governmental interest of remedying the present effects of past identified discrimination. Consequently, the central issue for decision by the Court is whether the *means* employed by the county was carefully tailored for that purpose.

16. As already stated, the means test proposes an evaluation of the following factors:

a) efficacy of alternative remedies, i.e. are there less intrusive means which might serve the compelling state interest;

b) the planned duration of the remedy;

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[37] See Finding of Fact No. 17.

c) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force, i.e. is there a reasonable relationship between the minority workers to be hired to the percentage of minority group members in the relevant population;

d) the availability of waiver provisions; and

e) the effect of the set aside on innocent third parties.

In order to determine whether the county's race-conscious program passes constitutional scrutiny, the two principal parts of the program must be examined separately.

17. THE SET-ASIDE. The set-aside provision of Ordinance 82-67 restricts competition in a given contract solely among Black contractors. It contains two limiting provisions, however, in its application. First, it may only be used when the county commission has determined it to be "in the best interest of the county." Next, it may only be used where it has been previously administratively determined that there are sufficient licensed Black contractors to afford effective competition for the contract. Ordinance 82-67 does not, of itself, set-aside any contract. It simply defines what race-conscious procedures will be employed if and when it has been determined that a contract should be set-aside. Resolution R-1350-82 actually set-aside the Earlington Heights station contract for competition exclusively among Black prime contractors.

The set-aside has several important consequences. First and most obviously, it excludes every potential prime contractor from even submitting a bid on the Earlington Heights contract unless the contractor happens to be Black-owned.[38] It is more than race-conscious, *it is race exclusive.* Second, it assumes that there are

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[38] Non-Black contractors can participate as part of a joint venture with a Black contractor. This apparently was done in the case of one of the bidders to this contract.

sufficient Black prime contractors to make an effective bid, even if the county has to encourage contractors from other areas of the country to participate. Finally, the set-aside marks an unusual departure from the settled principles of competitive bidding that is the distinguishing characteristic of government contracting. See e.g., 41 U.S.C.A. §§ 252, 253, Fla. Stat. Ann. § 255.29; Dade County Home Rule Charter, § 4.03(D).

18. In order to determine whether the county's set-aside is a constitutionally appropriate means of serving the compelling interest of redressing the effects of past discrimination, the set-aside remedy must be carefully tailored to achieve that objective in a manner reasonably related to the desired end of removing the continuing effects of past discrimination against Black contractors in Dade County. Measured against this standard the county's set-aside is clearly impermissible. Indeed, the question is not even close. The set-aside fails all five of the factors employed by the means test.

19. First, there are substantially less intrusive remedies available to the county for increasing Black contractor participation in the Metrorail system without totally excluding White contractors from a substantial benefit to which they would otherwise be entitled. For instance, the MBE goals already targeted by the county in accordance with federal regulations provide an excellent vehicle for involving greater minority participation in the overall project. In fact, as of September 30, 1982 the actual MBE participation of 19.6% exceeded the MBE goal of 16.5%. While the Court recognizes that this MBE goal includes other minorities in addition to Blacks, some 7% of the Metrorail contracts have in fact gone to Black contractors. How far local government can go in setting goals for minority participation will be discussed shortly, but a goal-oriented remedy of some sort is certainly less intrusive than an exclusive set-aside for Black contractors.

There are other positive proposals available to the county that may increase Black participation by making Black-owned firms more competitive in the bidding process itself, without excluding others from that process. The county may assist the Black contractor in preparing his bid and informing him of the intricacies of the government procurement process. The county has established a bond guarantee program for assisting Black contractors in meeting the bonding requirements for participation in county contracts. The county has affirmatively contacted Black businesses in an effort to make them aware of their eligibility and to involve them in county contracting.[39] In short, there are alternative remedies available to the county, some of which are now in effect, that are designed to meet the county's objective without imposing an exclusive set-aside that disadvantages others solely on the basis of race.

20. Second, while the Earlington Heights Station is a specifically designated set-aside, the underlying ordinance upon which the set-aside is based, 82-67, has no specific time limit. It is applicable to all future county contracts whether Metrorail or not. The county's representation that its race-conscious program would self-destruct by its own terms if and when Black contractors ever receive county contracts in proportion to their representa-

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[39] Certainly, the county should be encouraged to seek out local qualified Black contractors and take positive action to make them more competitive. Whether the county's objective of improving the local Black business climate is fostered by soliciting bids from out-of-state Black owned firms is another matter. The county has failed to articulate a rational basis for the proposition that an outside Black prime contractor will have a more positive impact on Black-owned businesses in Dade County than would a local White-owned contractor who aggressively seeks to employ Black subcontractors in the project. While awarding the prime contract for the Earlington Heights station to an outside Black prime contractor may be symbolic (and that may be a legitimate consideration for a local political body), it would not seem to involve any tangible benefits per se for the local Black business community.

tion in the overall population is at best indefinite and provides no firm guidance as to when this program will expire. Even though the Court is inclined to agree that the commission intended that the program terminate at that point, there is nothing in this record from which the Court could infer that there will ever be enough Black contractors in this county to participate to that extent. Unlike the Congressional set-aside approved in *Fullilove*, the county's set-aside appears designed to be a permanent part of its contracting requirements. Its permanent nature is in sharp contrast with the PWEA set-aside. That act was intended as a *short-term* measure to alleviate the problem of national employment and to stimulate the national economy. *Fullilove, supra*, 448 U.S. at 456-57, 100 S.Ct. at 2763-2764. The duration of the set-aside was not conditioned upon meeting any fixed percentage such as 10% (the percentage of the set-aside) or 17% (the percentage of minority group members in the nation). The act provided by its own terms that federal monies be committed to state and local grantees by September 30, 1977. 42 U.S.C.A. § 6707(h)(1). There is no equivalent section in Ordinance 82-67.

21. The next consideration is whether there is a reasonable relationship between the 100% set aside and the percentage of Blacks in the local population, i.e. 17%. Justice Powell in *Fullilove* approved the 10% set aside finding that it was roughly halfway between the percentage of minority contractors and the percentage of minority group members in the nation. In the instant case, however, 100% set aside far exceeds the percentage of Blacks in the local population.

The county urges the Court to view the set-aside in the context of overall county contracting and not just one Metrorail project. Over a ten year period, it is contended, the county will expend approximately 6.5 billion dollars on all its contracts. When the 40 million dollars worth of Metrorail contracts allocated on a race-conscious

basis is compared to the total expenditure of 6.5 billion, it amounts to approximately .6% of all contracts set-aside for Blacks. Instead of 100% of one contract set-aside for Blacks, the county suggests that the Court should view this from the perspective of a .6% set-aside, a much more acceptable percentage when examined in the context of total county contracting over a ten year period.

Although this is a novel perspective to view the set-aside, it is an incorrect one. Any theory which purports to give complete benefits to members of one race under the guise of a "totality" theory is fallacious. In the first place we have no "totality" of contracts before the Court. What we have is a single contract for the construction of the Earlington Heights Metrorail Station. It is the county's procedure of setting aside *that* contract that is at issue here, not the county's potential ten year plan involving thousands of contracts. What the county may do in the future is entirely speculative. It may set-aside .6% of all future contracts or it may immediately set-aside 17% of all future contracts until Black contractors share the requisite proportion of all county contracting.[40] It is the propriety of the 100% set-aside of the Earlington Heights station that is for the determination of the Court. Nothing else.

Furthermore, every exclusive set-aside could be justified if it was placed in a larger context. Each set-aside

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[40] The county manager testified on that point:

Q. Mr. Stierheim, listening to your counsel's last question, are you saying that your object here is to award $100,000,000 out of $600,000,000 this year to black contractors?

A. I don't think that is something achievable overnight. I think it is a worthy goal for this community over the next twenty, thirty years, and the quicker we get to it, I think the better off we will be.

Q. Over the next twenty or thirty years, you feel that 17 percent would be an attainable goal. Is that correct?

A. I can't give you a year figure. That is impossible.

Q. I am trying to know what is your figure for this year, Mr. Stierheim.

A. Progress.

must be evaluated on its own merits and under the particular conditions in which it developed. It therefore cannot be considered in the totality of county procurement.[41]

22. Turning to the next aspect of the means test, we find that the county's set-aside contains no waiver provision. While the set-aside is conditioned on the availability of responsible Black prime contractors; availability is a determination made solely by the county. There is no procedure by which an aggrieved White prime contractor can seek an administrative waiver from his exclusion under the set-aside.[42]

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[41] The county's reliance on *J.H. Rutter Rex Manufacturing Co. v. United States*, 534 F.Supp. 331 (E.D. La. 1982) does not persuade the Court otherwise. The outcome of that case was contingent upon the court's interpretation of regulations promulgated under the Armed Forces Procurement Act, 10 U.S.C.A. § 2301 et seq., and the Small Business Act, 15 U.S.C.A. § 631 et seq. To implement the Federal Government's policy, that a fair proportion of its purchases and contracts be placed with small business concerns, certain agency regulations provide that the entire amount of a contract shall be set-aside, under certain circumstances, for exclusive small business participation. This overall policy was deemed by Congress to be in the national interest as part of our national defense. Plaintiff was a manufacturer excluded from competing for a contract that was set-aside for small business concerns. Plaintiff was excluded because of its size. The district court upheld the exclusion.

The distinguishing features of the case are transparent. The court was faced with the task of determining, inter alia, whether Plaintiff was being deprived of a property interest without due process of law. No equal protection interests were implicated. Thus, no strict scrutiny was applied by the court. Moreover, the broadly worded statutory language construed by the district court referred to the totality of government procurement. No such reference is apparent in the instant case from any of the features of the county's race-conscious policy. Accordingly, the county can take no comfort from the Rutter case.

[42] In sharp contrast to the county's set-aside, the PWEA set-aside upheld in *Fullilove* had a comprehensive administrative scheme for granting waivers. See *Fullilove, supra*, 448 U.S. at 469-71, 100 S.Ct. at 2770-71. (Burger, J.).

23. Finally, it is unquestioned that the county's set aside has an adverse effect on innocent third parties, in this case, White prime contractors. Solely because of race, a White prime contractor is precluded from submitting a bid on the Earlington Heights station.

24. In summary, the county's 100% set-aside amounts to an impermissible preference of one racial group over another and therefore cannot stand.[43] It is a constitutionally inappropriate means of serving the purpose for which it was designed. The selection of a Black prime contractor does not reasonably increase the overall Black participation in the Metrorail system where that objective can be achieved by other, less intrusive, alternatives. When a race conscious remedy has totally excluded an individual from a substantial benefit solely on grounds of race, it cannot stand. The county will therefore be enjoined from applying the set aside provision of Ordinance 82-67 to the Earlington Heights Contract.

25. SUBCONTRACTING GOALS. The second major feature of the county's race-conscious policy is the application of a goal of 50% of the dollar of the prime con-

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[43] The county also relies heavily upon the Fifth Circuit case of *Ray Baillie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696 (5th Cir. 1973). This case does not alter the Court's determination that the 100% set-aside is impermissible. First and most important is the fact that the Fifth Circuit in that case expressly declined to reach the "discrimination" or equal protection issue. Second, the Small Business Administration is a federal agency and the challenged Section 8(a) program was found by the court to be "supported by Congressional and presidential mandates." 477 F.2d at 705-708. In sharp contrast, the challenge in the present case is to a local ordinance and resolution enacted by a county commission. Third, eligibility for the Section 8(a) program includes all concerns owned by socially or economically disadvantaged persons; thus, the classification is not on the basis of race nor is participation solely restricted to a particular minority group, unlike the ordinance and resolution under review. Finally, the plaintiffs in *Ray Baillie* had no standing to challenge the constitutionality of the program and its administration. 477 F.2d 709-10.

tract for Earlington Heights to be subcontracted to Black contractors. This goal is contingent upon the availability and capability of Black contractors to do the work.[44] There is however a waiver provision included in this section in which a qualified bidder may "demonstrate that he made every reasonable effort to meet the goal and notwithstanding such effort were [sic] unable to do so." What this means simply is that a successful bidder must either insure that there are sufficient Black subcontractors to do 50% of the dollar value of the contract or demonstrate why, after making a good faith effort, this goal could not be met.

Plaintiffs challenge the 50% goal principally because they assert that it is unreasonably high under the circumstances presented by this record. The Court does not agree. Although the issue is an extremely close one, the Court finds that the goal imposed by the county is reasonably related to the objective of increasing Black involvement in county construction contracts and that the fifty percent participation rate is not excessive in light of the racial realities that presently exist in Dade County.[45]

26. The difficulty with this part of the county's race-conscious program lies not with the use of a goal itself but with the high numerical percentage chosen by the county. There is nothing wrong with a numerical goal or quota *per se*.[46] Affirmative action plans containing goals ranging from 2% to 50% have been upheld by the courts under a variety of factual situations.[47] Although

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[44] Contracts awarded under this provision also require that the Black subcontractor have a place of business within the Dade County geographical area.

[45] See Finding of Fact No. 48.

[46] Whether the county describes its remedy as a quota or a goal, it is a line drawn on the basis of race and ethnic status. *Bakke*, supra, 438 U.S. at 289, 98 S.Ct. at 2747.

[47] See *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979) (50% of the openings in newly

there has been some discussion about the semantical distinction between impermissible quotas and flexible racial preferences or goals, *Valentine v. Smith, supra* at 510 n. 15, *Bakke,* supra 438 U.S. at 317, 98 S.Ct. at 2762, there is nothing illegal about the use of a goal so long as it contains sufficient flexibility to distinguish it from an impermissible quota.

The question then arises whether this 50% goal is reasonably related to its objective of attracting more Black participation in county construction contracting. To survive strict judicial scrutiny, the same test applies to the numerical goal that was previously applied to the set-aside.

27. The numerical goal suffers from several of the same disabilities as the set-aside. For example, the program has no definite expiration period incorporated into the race-conscious ordinance itself. Its duration is entirely at the discretion of the county commission. They may continue the program indefinitely or terminate it at once.

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created in-plant training programs reserved for Blacks); *Schmidt v. Oakland United School District,* 662 F.2d 550 (9th Cir. 1981), vacated and remanded on other grounds, —— U.S. ——, 102 S.Ct. 2612, 73 L.Ed.2d 245 (1982) (25% MBE set-aside on school construction projects); *Valentine v. Smith,* 654 F.2d 503 (8th Cir.), cert. denied, 454 U.S. 1124, 102 S.Ct. 972, 71 L.Ed.2d 111 (1981) (requiring 25% of the faculty hired between 1976-1979 to be Black); *Local Union No. 35 etc. v. City of Hartford,* 625 F.2d 416 (2d Cir. 1980), cert. denied, 453 U.S. 913, 101 S.Ct. 3148, 69 L.Ed.2d 997 (1981) (15% level of minority and women employment with regards to city's major construction contracts); *Associated General Contractors of Massachusetts, Inc. v. Altshuler,* 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957, 94 S.Ct. 1971, 40 L.E.2d 307 (1974) (20% minority hiring goal on state construction projects); *M.C. West, Inc. v. Lewis,* 522 F.Supp. 338 (M.D. Tenn. 1981) (2.5% MBE set-aside and a 1% WBE set-aside on state highway construction projects).

The use of a numerical goal has an adverse effect on innocent White contractors since it compels a preference for Black contractors. This consequence is less severe than the set-aside since it leaves one-half of the dollar value of a prime contract available for White contractors without any restrictions. Consequently, its adverse effect is more widely dispersed than the set-aside.[48]

28. Even with these liabilities, the numerical goal portion of the county's race-conscious program is not without important support. First and most importantly, it has a reasonable waiver provision built in that will ameliorate any hardships on a particular prime contract. If one-half of the values of the prime contract cannot be awarded to responsive, eligible Black contractors, the percentage can be adjusted downward to reflect the economic realities that exist. This is in stark contrast to the set-aside.[49]

Alternative remedies do exist but they consist generally of those previously mentioned in the discussion of the set-aside: educational and administrative assistance, financial guarantees, increased awareness of potential opportunities. In this situation the obvious alternative remedy is to select a lower percentage as a goal. Other than that there are no readily available alternatives to the use of a numerical goal.

29. Up to this point in our analysis of the 50% goal there is no obvious determination regarding the constitu-

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[48] Cf. *Fullilove, supra* 448 U.S. 515, 100 S.Ct. at 2793 (Powell, J.).

[49] Although the county suggests that there is a de facto waiver provision in the set-aside because three eligible Black contractors must be available before any contract can be set-aside, this is not a waiver. Under the county's plan, the county is solely responsible for determining whether the requisite Black contractors exist. A waiver however permits the contractor to participate even if he cannot locate the required number of Black subcontractors so long as he makes a good faith effort.

tionality of this feature. Both the waiver provision and the lack of practical alternatives lend support to the conclusion that it is a constitutionally appropriate means of serving the county's objective of increasing Black contractor participation in its contracting. Conversely, the 50% goal is indefinite in duration and adversely impacts innocent White subcontractors. The ultimate determination therefore depends on whether there is a reasonable relationship between the 50% goal and the percentage of Blacks in the population of Dade County.[50]

30. Once the basic concept of a race-conscious numerical goal has been constitutionally approved, the percentage goal selected is largely a matter of discretion.

> [I]f a 50 percent quota is legal, so also is a 30 percent, a 50 percent, or a 75 percent quota. See *United Steelworkers v. Weber*, 443 U.S. 193, 208, 09, 99 S.Ct. 2721, 2730, 31, 61 L.Ed.2d 480 (1979). Consequently, there is no distinction in the figures. The only giant step has now been taken and judicially approved. From 15 percent to 75 percent is simply the continuance of a process already under way, and there is no logical stopping place in between.

Local Union No. 35, etc. v. City of Hartford, 625 F.2d 416, 428 (2d Cir. 1980) (Van Graafeiland, J., dissenting).

The Court's function in this case is limited to deciding whether the county commission abused its discretion

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[50] The Court rejects plaintiffs' contention that a more significant relationship is that between the percentage of Black contractors available and eligible to participate in a specific county contract and the percentage of the county contracts actually awarded to Black contractors. The relationship of the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force has already been judicially approved. See *Fullilove, supra* 448 U.S. at 510, 100 S.Ct. at 2791 (and cases cited) (Powell, J.).

when it chose a 50% goal for the Earlington Heights contract. While the county's 50% figure may have been high, it is not unreasonable under the circumstances of this case.

Federal courts have a responsibility to take into account the interests of state and local authorities in managing their own affairs consistent with the constitution. Due deference should be given to the political body charged with developing a race-conscious plan to meet local conditions. A number of considerations could have supported the percentage goal selected:

a. Testimony adduced at the final hearing indicated that the county's goal was based largely on the availability of Black contractors to do the work.[51] The Earlington

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[51] The following colloquy took place between the Court and witness Sergio Pereira:

THE COURT: One more question. I will try to phrase it like I did with the young lady.

Would you describe for me—sit back and take your time—the exact criteria that you used in arriving at the MBE 50 percent goal?

THE WITNESS: The criteria, Your Honor, was submitted to us by the department, and—

THE COURT: What department?

THE WITNESS: The Transportation Department.

THE COURT: Somebody from the Transportation Department said, quote-unquote, make it 50 percent?

THE WITNESS: No. If I may find it—

THE COURT: Take your time.

Mr. Witness, let me explain. What I am concerned with—and maybe you can just tell me this in your own words without going through all of those documents, once we have a goal program, doesn't there have to be some criteria whether the goal is ten percent, 20 percent, 50 percent or 97.2 percent?

THE WITNESS: The criteria here that is being established is 50 percent. Each department is required to present a suggestion to the contract review committee as per the ordinance.

The ordinance is established because of legislative findings which have been described here in the courtroom.

The department then takes into consideration the number of dollars, contract dollars, that they have awarded, the number of Black

Heights contract was originally envisioned to have a 44% MBE goal. It was later changed to a 50% Black participation goal on the grounds that there were more Black contractors available and capable of doing the work. While this should not be the only consideration, it is certainly a legitimate concern. If there are not enough Black contractors available and capable of performing under the contract, no realistic figure can be chosen.

b. A higher goal, if it does not inordinately infringe upon the rights of innocent third parties, will be more effective since it will encourage the formation of Black MBE's and their participation in the local construction industry.

c. This community is uniquely tri-ethnic and Black residents are not even the largest minority group. Members of the Hispanic community make up fully 41% of the total population. Black-owned businesses have not only failed to keep pace with the White community, they have fallen behind their counterparts in other areas of the nation. An accelerated goals program could reasonably be considered necessary in arresting this apparent slide by Black contractors.

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contractors, prime contractors and subs that have participated in those awards, and then also look at some of the intangibles, because we do look—I look at least, and I am not going to speak to the other members of the committee, but as chairman of the committee, in order to reach my decision, I also look at some of the intangibles, where is this job, what is the purpose, the public purpose of this job, so on and so forth.

All of those things put together constitute the criteria whereby the department submits a particular goal to the contract review committee.

In this particular case, taking all of those things into consideration, and also looking at the economic impact, the highest economic impact into the black community, the availability of the subcontractors, the capability of those subcontractors in the different sub trades, the department reached a goal of 50 percent.

d. No one in this community can ignore the racial problems that currently exist. These problems have been fully documented in the reports that make up this record and that formed the basis for the county's findings that past discriminatory practices have to some decree adversely affected and impaired the competitive position of Black-owned businesses so that they have not fully shared in the county's economic growth. The county commission, the legislative body of the local government, is charged with preserving the public welfare.[52] It should therefore be granted considerable latitude in implementing affirmative action goals where the need exists in the community.

e. The record shows that this contract is but one out of twenty. It is located in the Black community and is a visible symbol of Black participation in the Metrorail system and county construction contracting in general. The symbolic importance of fostering Black participation is a legitimate consideration by the county government in setting a reasonable percentage goal for Black involvement.

f. Justice Powell's suggested benchmark of reasonableness in *Fullilove*, 448 at 513-14, 100 S.Ct. at 2793, consisted of a determination that the 10% MBE under consideration there fell roughly halfway between the percentage of minority contractors and the percentage of minority group members in the nation. This equation, though helpful, is not meant to be a formal *per se* rule to be applied regardless of circumstances. Admittedly, under Justice Powell's rule of thumb a goal of roughly 9% would be permissible since only 1% of the contractors in Dade County are Black and the Black population is 17%. Any figure higher than 9% would be questionable. Under the conditions that presently exist in this county, however, a numerical goal considerably higher than 9% is warranted.

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[52] Home Rule Charter, Art. I § 1.01; Fla.Stat.Ann. S125.01.

31. It is not within the prerogative of this Court to advise the county commission as to the wisdom of its affirmative action plan. It is the political body that must be responsive to the needs of the residents of Dade County and should be accorded considerable discretion in its policy making function. An affirmative action plan designed with the objective of increasing Black involvement in county contracting without unnecessarily excluding others on the basis of race does not violate the constitution when it is narrowly tailored to redress the present effects of past discrimination. The county's 50% goal is so tailored.

V.

The Court has ruled in part IV of this opinion that the one hundred percent set-aside procedure established by Ordinance 82-67 and applied to the Earlington Heights Station in Resolution R-1350-82 is constitutionally impermissible. The percentage goal applied to the Earlington Heights Station has survived strict scrutiny and falls within the discretionary powers of local government.

The Court has jurisdiction in this matter to enter a declaratory judgment and an injunctive decree. On the basis of the conclusions of law reached in this opinion the Court will issue:

a. A declaratory judgment declaring that the defendants have violated the Fourteenth Amendment to the United States Constitution, Article 1, Sections 2 and 9 of the Florida Constitution, and 42 U.S.C. Section 1981 and Section 1983 by implementing and enforcing racially discriminatory ordinances, resolutions, and policies requiring that Black only prime contractor set-asides be established for selected Metropolitan Dade County construction projects to be bid and awarded; and

b. A permanent injunction permanently enjoining the Defendants, and each of them, their agents, employees, and successors from enforcing ordinances, resolutions, bid

specifications, bid advertisements, and policies mandating that a Black only prime contractor set-aside be established for the Earlington Heights Metrorail Station, contract no. N336R.

A declaratory judgment and permanent injunction will be issued by separate order. The Court will reserve jurisdiction to consider an award to plaintiffs of costs and attorneys fees pursuant to 42 U.S.C. § 1988 upon appropriate post-trial motion.

VI.

The extent to which the government may employ race-conscious measures to rectify the continuing effects of past discrimination has become one of the most vexing social issues of our time. The ultimate objective of all affirmative action programs remains the same: to bring to an end the racial divisions that divide our country by placing minorities disadvantaged by discrimination on a relatively equal footing with the rest of society. Unfortunately, this cannot be done without adversely affecting others.

> Undeniably there are risks in affirmative action programs. In the short run they may exacerbate rather than diminish race-consciousness. They may cause resentment. They may foster the belief that some need special advantages because they cannot succeed on their merits. This court has therefore proceeded cautiously, approving affirmative action plans where their purpose and need has been appropriately established, their goals have been reasonable in terms of the affected minority, and their tendency to reinforce race consciousness has been minimized.

Local Union No. 35 v. City of Hartford, 625 F.2d 416, 421 (2nd Cir. 1980), *cert. denied*, 453 U.S. 913, 101 S.Ct. 3148, 69 L.Ed.2d 997 (1981).

The undersigned judge has intensively wrestled with these issues over the short period this action has been

pending. Even if more time for reflection had been available, it's unlikely that the solution would have come any easier. There are no easy solutions where one individual's right to be free from discrimination directly conflicts with another's right to be made whole from past discrimination. This "catch-22" has been apply expressed by Justice Blackmun in *Bakke* where he observed that "[i]n order to get beyond racism, we must first take account of race. There is no other way." Id. at 438 U.S. at 407, 98 S.Ct. at 2807 (separate opinion).

The defendants are the duly elected and appointed members of this county's government. They are to be commended for their efforts to overcome the effects of discrimination against the Black members of our community. It is clear that the race-conscious measures taken by the defendants were motivated by the best of intentions and were designed to involve members of the Black community in an important part of county life. One of these measures, the set-aside, however, went further than was necessary and resulted in an unlawful preference for one racial group over another. Such a racial preference cannot be sustained. The other measure, the 50% goal, is narrowly tailored to achieve its intended purpose and is reasonable under all of the circumstances. It will be upheld.

As we well know, the Constitution is not yet color-blind.[53] The moment it was decided that our Constitution permits the government to classify individuals based solely upon their race, however well intentioned, the command of the equal protection clause was muted and the courts became embroiled in deciding when discrimination is proper and under what circumstances. Someday the color of a person's skin will be about as important in con-

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[53] See *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 1146, 41 L.Ed. 256 (1896) (Harlan, J. dissenting); *Fullilove v. Klutznick*, 448 U.S. 448, 522-23, 100 S.Ct. 2758, 2797-98, 65 L.Ed.2d 902 (1980) (Stewart, J. dissenting).

stitutional adjudication as the color of that person's hair is today. That day cannot come too soon, but until it does, judges will face difficult constitutional decisions regarding the propriety of benign racial discrimination.

Our ultimate objective as a nation to be free from governmentally imposed racial distinctions of any kind has been cogently summarized by Justice Powell in *Fullilove*, 448 U.S. at 517, 100 S.Ct. at 2794, where he stated:

> In the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race. Indeed, our own decisions played no small part in the tragic legacy of government-sanctioned discrimination. See *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896); *Dred Scott v. Sanford*, 19 How. 393 (60 U.S.), 15 L.Ed. 691 (1857). At least since the decision in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the Court has been resolute in its dedication to the principle that the Constitution envisions a Nation where race is irrelevant. The time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin. But in our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination.

DONE AND ORDERED in chambers at Miami, Florida, this 16th day of December, 1982.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 82-2427-Civ-JWK

SOUTH FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., *et. al.*,

Plaintiffs

vs.

METROPOLITAN DADE COUNTY, FLORIDA, *et. al.*,

Defendants.

DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

[Filed Dec. 20, 1982]

This action came on for final hearing before the Court, the undersigned judge presiding and the issues having been duly heard and a decision having been duly rendered by the Court's Memorandum Opinion Containing Findings of Facts and Conclusions of Law issued December 16, 1982, it is therefore

ORDERED AND ADJUDGED as follows:

(a) As to the set-aside authorized by Ordinance No. 82-67 and applied to the Earlington Heights Metrorail Station by Resolution No. R-1350-82, the Court hereby declares that this portion of the ordinance and resolution has violated the Fourteenth Amendment to the United States Constitution, Article 1, Sections 2 and 9 of the Florida Constitution, and 42 U.S.C. Sections 1981 and 1983;

(b) As to the goals provision authorized by Ordinance No. 82-67 and applied to the Earlington Heights Metrorail Station by Resolution No. R-1350-82, the Court hereby declares that this portion of the ordinance and resolution is constitutional under both the United States Constitution and the Florida Constitution; and

(c) Defendants therefore, and each of them, their agents, employees, and successors are hereby permanently enjoined from enforcing ordinances, resolutions, bid specifications, bid advertisements, and policies mandating that a Black only prime contractor set-aside be established for the Earlington Heights Metrorail Station, contract no. N336R; provided however, that the two bids currently under seal and in the Court's possession shall be returned directly by the Clerk to the respective bidders.

DONE AND ORDERED in Chambers at Miami, Florida, this 20th day of December, 1982.

/s/ James W. Kehoe
JAMES W. KEHOE
United States District Judge

cc: David V. Kornreich, Esquire
R. A. Cuevas, Jr., Esquire
Theodore Klein, Esquire
Leon E. Sharpe, Esquire

No. 83-1872

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

SOUTH FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., *et. al.*,
Petitioners

v.

METROPOLITAN DADE COUNTY, FLORIDA, *et. al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND PROPOSED BRIEF AMICUS CURIAE OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

G. BROCKWEL HEYLIN
Counsel of Record
MICHAEL E. KENNEDY
1957 E Street, N.W.
Washington, D.C. 20006
202/393-2040
Attorneys for
The Associated General Contractors of America, Inc., as Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution permit Metropolitan Dade County, Florida, purposely to discriminate against all non-Black construction contractors and subcontractors under the relevant circumstances?

IN THE

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OCTOBER TERM, 1983

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MOTION OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Associated General Contractors of America, Inc. (hereinafter "AGC"), respectfully moves this Court, pursuant to Supreme Court Rule 36, for leave to file the attached proposed brief *amicus curiae* in support of the petition for a writ of certiorari in this proceeding. In support of this motion, AGC states as follows:

1. Pursuant to Supreme Court Rule 36, AGC requested consent of the parties to the filing of the proposed

brief *amicus curiae*, and received consent from Petitioners but not from Respondents. Although filing of a motion for leave to file *amicus curiae* in support of a petition for a writ of certiorari without consent of all parties is not favored under the Court's rules, AGC's strong member interest in special preference programs and its long experience in the construction industry make AGC uniquely situated to provide assistance to this Court on the matters raised in this proceeding.

2. AGC is a national trade association consisting of 111 state and local chapters. AGC's 32,000 member firms, including approximately 8,500 of America's leading general contracting businesses, are made up of large, medium and small firms, as well as minority or women owned firms. These firms operate in the construction industry throughout the United States, including Dade County, Florida, and are responsible for the employment of 3.5 million workers.

3. Construction is the largest industry in the United States representing approximately 8 percent of the nation's Gross National Product. AGC members perform almost 80 percent of the general contracting construction work performed in the United States each year, including the construction of commercial buildings, highways, industrial and municipal-utility facilities, and public construction such as the rapid transit system involved in this case.

4. AGC members include a large number of firms which bid on, negotiate for, and undertake public construction of all types which in an increasing number of jurisdictions is subject to racial or sexual preferences, set asides, quotas or goals under various state or local laws.* Because of its race exclu-

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* For example, Richmond, Va., Ordinance 83-69-59 (April 11, 1983) requires 30 percent of all city construction to be awarded

sivity, the Dade County ordinance at issue here is of particular concern to AGC's members, but AGC is also broadly concerned about the trend toward similar ordinances.

5. AGC strongly supports free, open and fair competition for public works construction projects because such an approach means value for taxpayers and opportunities for all contracting firms, minority and otherwise. From an overall industry perspective, AGC views limitations on competition as unwise, but particularly destructive are denials of opportunity based solely on the race of the contractor. Race specific contracting is not only contrary to the constitutional rights of those excluded, but it increases construction costs by limiting competition. Moreover, those businesses operating in the sheltered, noncompetitive atmosphere of a racial or sexual preference may not develop the hardiness to survive outside that green house in this highly competitive industry. Such preferences ensure not equal opportunity, but seriatim opportunity based on race or sex.

6. AGC regularly represents the interests of its general contractor members in important matters vitally affecting those interests before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the Federal Government. This includes assistance to courts in

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to minority business enterprises (hereinafter "MBEs"). Seattle, Wash., Ordinance 109-113 (June 17, 1980) sets utilization levels of 15 percent for MBEs, and 3 percent for women's business enterprises (hereinafter "WBEs"), on city projects, and disqualifies bidders not reaching those levels. The Charlotte, N.C., Minority/Women's Business Enterprise Plan (October 26, 1981) set a 16 percent MBE goal and 4 percent WBE goal for fiscal year 1982. A partial list of other jurisdictions with MBE and/or WBE ordinances includes Atlanta, Ga.; Washington, D.C.; Richmond, San Diego and Los Angeles, Calif.; Cincinnati, Ohio; Boston, Mass.; Philadelphia, Pa.; Portland, Ore.; New York, N.Y.; and Takoma, Wash.

their deliberations on significant matters concerning public contracting policies, labor-management relations, and labor standards in the construction industry, such as the issues Petitioners seek to bring to this Court. As an *amicus curiae*, AGC assisted this Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and more recently, *Edward J. DeBartolo v. NLRB*, —— U.S. ——, 103 S.Ct. 2926 (1983), and *Building and Construction Trades Department, AFL-CIO v. Donovan*, 712 F.2d 611 (D.C. Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 975 (1984).

7. AGC's objective as an *amicus curiae* is to support constitutional rights and competition in the construction industry. AGC's sixty-five years of experience in the construction industry place it in a unique position to serve the Court as an *amicus curiae* in this proceeding.

For the foregoing reasons, AGC respectfully requests that (1) this Motion for Leave to File Brief *Amicus Curiae* in Support of the Petition for Writ of Certiorari be granted, (2) that the attached proposed brief *amicus curiae* be accepted for filing, and that, (3) AGC be permitted to file a brief as *amicus curiae* on the merits in the event that the petition for writ of certiorari is granted.

Respectfully submitted,

G. BROCKWEL HEYLIN
Counsel of Record
MICHAEL E. KENNEDY
1957 E Street, N.W.
Washington, D.C. 20006
202/393-2040
Attorneys for
The Associated General Contractors of America, Inc., as Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

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PROPOSED BRIEF AMICUS CURIAE OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Subject to the foregoing motion for leave to file as an *amicus curiae*, the Associated General Contractors of America, Inc. (hereinafter "AGC"), respectfully submits this brief in support of the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

INTEREST OF THE AMICUS CURIAE

The foregoing motion for leave to file as an *amicus curiae* fully states AGC's interest in the question presented.

STATEMENT OF THE CASE

I. The Factual Setting

This case concerns a county's procedures for awarding public construction contracts. The case revolves around two decisions in July and October of 1982. In July, per Ordinance No. 82-67 (July 20, 1982) (hereinafter "Ordinance 82-67"), the Board of County Commissioners for Dade County, Florida (hereinafter "the Commission"), authorized itself to designate general construction contracts "for competition solely among black contractors." *South Florida Chapter* v. *Metropolitan Dade County*, 552 F. Supp. 909, 919-920 (S.D. Fla. 1982). The Commission also authorized goals for Black subcontractors—goals which general contractors would have to make "every reasonable effort" to meet, in order to qualify for public contracts. *Id.*

The following October, per Resolution No. R-1350-82 (October 5, 1982) (hereinafter "Resolution R-1350-82"), the Commission exercised its new authority, designating the Earlington Heights station, one component of the county's new Metrorail system, for competition solely among Black contractors. *Id.*, at 923-924. The Commission also imposed a 50% Black subcontractor goal on that project. *Id.*

Roughly one year before the Commission took these steps, four separate sets of experts had carefully examined the economic and other circumstances of the Blacks residing in Dade County. *Id.*, at 914-916. In reports submitted to the Commission, these experts found the circumstances to be most troubling, and further, to justify some kind of Commission response. *Id.* None of these experts, however, attributed the circumstances to racial discrimination. *Id.* To the contrary, one of the reports determined that Black business development in Dade County had fallen far behind that of Blacks in most major cities elsewhere in the United States. *Id.*,

at 915. Another determined that the Black businessmen in Dade County had not kept pace with the gains which Black businessmen had made nationally. *Id.*, at 914-915.

At the same time, other statistical data revealed that 1.4 percent of Dade County's 1977 construction volume had gone to Black contractors and subcontractors—though Blacks, at that time, had owned only one percent of *all* business establishments in Dade County. *Id.*, at 914.

Nevertheless, in November of 1981, the Commission adopted Resolution No. R-1672-81 (November 3, 1981) (hereinafter "Resolution R-1672-81"), "recogniz[ing] the reality that past discriminatory practices have, to some degree, adversely affected our present economic system and have impaired the competitive position of businesses owned and controlled by Blacks . . . ." *Id.*, at 916. In the same resolution, the Commission also noted "a statistically significant disparity between the county's Black population and both the number of Black businesses within the County and those receiving County contracts." *Id.*

The record is devoid of any other Board "findings" of prior racial discrimination. *Id.*, at 912-927. Ordinance 82-67, adopted nine months later, adverts to one additional report, but does not supplement the earlier "findings." Ordinance 82-67, *supra.*

Rather than set any overall limits on either the set-asides or the subcontractor goals, Ordinance 82-67 requires the county manager to establish procedures for review of each construction contract which the county proposes to fund, in whole or in part—"to determine whether the inclusion of race-conscious measures," specifically including set-asides and subcontractor goals, "will foster participation of qualified Black contractors and subcontractors in the contract work." *Id.* Nor does the ordinance set an expiration date, or define the circumstances under which it would expire.

The implementing regulations require the Commission to consider set-asides whenever three Black general contractors are believed to be capable of doing the work. 552 F. Supp. at 920-922, 922 n.9. Further, they require subcontractor goals to "relate to the potential availability of Black-owned firms," defining availability to include "all Black-owned firms with places of business . . . within the Dade County geographic area." *Id.*

As of August of 1982, the Commission had used open competitive bidding to award the majority of the contracts for the Dade County Metrorail system. *Id.*, at 918. That had led the Commission to award approximately 7% of the Metrorail and related construction to Black contractors and subcontractors. *Id.*, at 917.

Because the federal government was also funding the system, the Urban Mass Transit Administration had imposed independent federal goals for minority business enterprises (hereinafter "MBEs"). As of September of 1982, the federal MBE goal on the system was 16.5%. *Id.*, at 919. The MBE participation was 19.6%. *Id.*

In October of 1982, when the Commission adopted Resolution R-1350-82, setting-aside the contract for the Earlington Heights station, and imposing a 50% Black subcontractor goal on that project, the Commission determined that a sufficient number of Black prime contractors were available, Resolution R-1350-82, *supra*, though "no Black prime contractors in Dade County [were] qualified to perform major county construction projects," 552 F.Supp. at 926. "[T]he county . . . solicited and recruited major, well-established Black prime contractors from outside Dade County and the State of Florida . . . ," *id.*, but secured only two bids for the work. *Id.*, at 925.

Metropolitan Dade County has no racial or ethnic majority. Using preliminary 1980 Census data, the Commission has estimated that 16% of the county's residents

are Black, that another 41% are Hispanic, and that the remaining 43% are non-Hispanic Whites. *Id.*, at 914.

II. The Decisions Below

After granting a temporary injunction against the Commission's exercise of its new authority, the United States District Court for the Southern District of Florida (hereinafter "the District Court") held that the set-aside provisions of the ordinance are unconstitutional, both as written and as applied. The District Court upheld the subcontractor goals. *South Florida Chapter* v. *Metropolitan Dade County, supra.*

On appeal, a panel of the United States Court of Appeals for the Eleventh Circuit (hereinafter "the Court of Appeals") upheld the set-aside and the subcontractor goals. *South Florida Chapter* v. *Metropolitan Dade County*, 723 F.2d 846 (11th Cir. 1984).

A petition for rehearing, and suggestion for *en banc* consideration, were denied on March 22, 1984. *South Florida Chapter* v. *Metropolitan Dade County*, No. 83-5001 (11th Cir. March 22, 1984).

SUMMARY OF REASONS FOR GRANTING THE PETITION

The Supreme Court should grant the petition for a writ of certiorari because the Court of Appeals addressed an important but unsettled question of federal law, and in the process, the Court of Appeals contravened *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) (hereinafter "*Bakke*") and *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980) (hereinafter "*Fullilove*"). *See* Sup. Ct. R. 17.1(c). The question presented is no less important than the question of purposeful racial discrimination in access to public facilities, for the Commission has denied all non-Black construction contracts and subcontractors access to public construction. The question is unset-

tled, and readily merits the Supreme Court's attention, because the Commission has asserted a remedial interest in its racial discrimination. Both *Bakke* and *Fullilove* concerned remedial measures, but neither produce an analytical consensus among the Justices of this Court. The Court of Appeals contravened *Bakke* and *Fullilove* in that it disregarded the dispositive elements of those decisions.

The extreme facts of this case present the Supreme Court with a unique opportunity to arrive at an analytical consensus in a critical but unsettled area of constitutional law. The bottom line is that this case is at least several steps beyond *Fullilove.*

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals Addressed an Important but Unsettled Question of Federal Law.

The Commission engaged in purposeful racial discrimination. Ordinance 82-67 "is more than race conscious, *it is race exclusive.*" 552 F. Supp. at 935 (emphasis in original). Whether the ordinance and its subsequent implementation therefore violate the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, is an important federal question which the Supreme Court should settle.

More than forty years ago, this Court confirmed that racial discrimination has to be "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States,* 320 U.S. 81, 100 (1943). Further, this Court held that "all legal restrictions which curtail the rights of a single racial group are immediately suspect," and that the "courts must subject them to the most rigid scrutiny." *Korematsu* v. *United States,* 323 U.S. 214, 215 (1944). Heeding these principles, this Court proceeded to reject racially restrictive covenants among private property owners, *Shelly* v.

Kramer, 334 U.S. 1 (1948), and racial segregation in elementary public education, *Brown* v. *Board of Education*, 347 U.S. 483 (1954). In rapid succession, this Court then rejected racial discrimination in access to public beaches, *Mayor of Baltimore* v. *Dawson*, 350 U.S. 877 (1955), public golf courses, *Holmes* v. *City of Atlanta*, 350 U.S. 879 (1955), public buses, *Gayle* v. *Browder*, 352 U.S. 903 (1956), public parks, *New Orleans City Park Imp. Ass'n* v. *Detiege*, 358 U.S. 54 (1958) and state courtrooms, *Johnson* v. *Virginia*, 373 U.S. 61 (1963). More than twenty years ago, this Court could declare that "it is no longer open to question that a State may not constitutionally require segregation of public facilities." *Id.*, at 62.

No twist of logic can justify a legal distinction between the use of public facilities and their construction. In either case, the action is state action subject to the Fourteenth Amendment. Thus, this case is at least as important as the early cases on access to public facilities. Notwithstanding the early cases, and many more recent cases, *e.g.*, *Loving* v. *Virginia*, 388 U.S. 1 (1969), the Court of Appeals held that the Commission's purposeful discrimination against all non-Black construction contractors and subcontractors does not violate the Equal Protection Clause, *supra*.

To be sure, *Bakke* and *Fullilove* have raised the new issues which the remainder of this brief explores. Amicus AGC submits that a fair and candid reading of *Bakke* and *Fullilove* requires this Court to reverse the Court of Appeals. Nevertheless, Amicus AGC has to concede the obvious: that neither *Bakke* nor *Fullilove* produced an analytical consensus. These decisions have not settled the constitutional limitations on racial discrimination. As the District Court succinctly noted, "no clear guidance has emerged in this tangled area of the law." 552 F. Supp. at 929.

II. The Decision Below Conflicts with the Decisions of the Supreme Court.

The Supreme Court decisions which are most readily applicable to this case are the two already highlighted: *Bakke* and *Fullilove*. The Court of Appeals overlooked and therefore neglected the dispositive elements of these decisions.

Bakke struck down a special admissions program at the medical school of the University of California at Davis (hereinafter "Davis"). That program had set-aside sixteen of one hundred openings in the school's entering class specifically for minorities. The contention was that the program violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6 (1976 & Supp. V 1981) (hereinafter "Title VI"), and the Equal Protection Clause of the Fourteenth Amendment, *supra*. Five Justices reached the constitutional question on the theory that the program violated Title VI only if it also violated the Fourteenth Amendment. Four of the five found that the program violated neither. The fifth, Justice Powell, found that it violated both. The other four Justices, without reaching the constitutional issue, found that the program violated Title VI.

Announcing the judgment of the Supreme Court, and casting the decisive vote, Justice Powell confirmed that the special admissions program would be subject to strict scrutiny. 438 U.S. at 287-291. Thus, the burden fell on Davis to show "that its purpose or interest [was] both constitutionally permissible and substantial, and that its use of the classification [was] 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *Id.*, at 305, *citing In re Griffiths*, 413 U.S. 717, 721-722 (1973); *Loving* v. *Virginia*, *supra*, at 11 (1969); *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964). Davis failed to shoulder that burden. The school could not justify its claim to a compelling interest in providing a remedy for past discrimination, 438 U.S. at 307-310, and

its program was only loosely related to its sufficient interest in such racial and ethnic diversity as would encourage the robust exchange of ideas, *id.*, at 311-315, 319-320. The program "totally excluded" non-minorities "from a specific percentage of the seats in an entering class." *Id.*

Two years after *Bakke*, *Fullilove* upheld a minority business enterprise preference which Congress had inserted into the Public Works Employment Act of 1977, Pub. L. 95-28, § 103(f)(2), 91 Stat. 116, 117 (1977) (hereinafter "PWEA"). The relevant provision limited federal grants for public works to those states and localities providing satisfactory assurance that they would allocate at least ten percent of their grants to MBEs unless the Secretary of Commerce were to grant a waiver. The *Fullilove* argument was that the preference violated the equal protection component of the Due Process Clause of the Fifth Amendment, U.S. Const. amend V. Six Justices voted to uphold the MBE requirement, but no more than three of the six joined in any one opinion. Three Justices dissented.

Chief Justice Burger announced the judgment of the Court, and delivered the plurality opinion. Without emphasizing conventional standards of review, the Chief Justice held that even Congress could "proceed only with programs narrowly tailored to achieve its objectives, subject to continuing evaluation and reassessment" and "vigilant and flexible" administration, 448 U.S. at 490, for "[a]ny preference based on racial or ethnic criteria must receive a most searching examination . . . ," *id.*, at 491. Congress had "press[ed] the outer limits of congressional authority," *id.*, at 490, but had not exceeded its Spending Power, at least as that power had been informed by § 5 of the Fourteenth Amendment, *id.*, at 472-478.

Nor had Congress selected an improper means of pursuing its "strictly remedial" objectives. *Id.*, at 480-489. As the Chief Justice carefully reasoned, Congress had not

"inadvertently effected an invidious discrimination" by excluding groups which had suffered "a degree of disadvantage and discrimination equal to or greater than that suffered" by the included groups—Negroes, Spanish-speaking, Oriental, Indians, Eskimos and Aleuts. *Id.*, at 486. Congress had presumed that all of the members of these groups had suffered some degree of social or economic disadvantage, but it had also provided for rebuttal of that presumption as it might apply to any one MBE. *Id.*, at 487, 489. A waiver would be not only justified but also forthcoming where the MBE requirement would otherwise compel a general contractor to subcontract to an MBE at a price "inflated" by more than "the present effects of disadvantage or discrimination." *Id.*, at 470-471. To limit the MBE preference to the truly disadvantaged, the Secretary of Commerce had also created a special procedure for processing complaints that MBEs were unjustly participating in the program. *Id.*, at 471-472.

Congress had set an overall limit on the MBE preference, and as a result, the Chief Justice could assess the overall burden on innocent third parties. *Id.*, at 484-485. Further, the Chief Justice could rely on the PWEA's limited duration to guard against excess. *Id.*, at 489.

Justice Powell not only joined in Chief Justice Burger's plurality opinion, but also delivered a separate concurrence—specifically to confirm that the plurality's approach was consistent with *Bakke*. Emphasizing that the Supreme Court had "never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations,"[1] *id.*, at 497, Justice Powell explained that a legitimate interest in such remedies becomes compelling when "an appropriate governmental authority" has found such violations. *Id.*, at 498. Congress was such a body because it had been given "the unique constitutional power of legislating to

[1] *See also Bakke, supra*, at 302, 307 (Powell, J., concurring).

enforce the Thirteenth, Fourteenth and Fifteenth Amendments." *Id.*, at 500. The Chief Justice, for his part, had found it to be "fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Id.*, at 483.

Justice Powell further explained that "the enforcement clauses of the Thirteenth and Fourteenth Amendments" had given Congress not only new powers but also a "measure of discretion." *Id.*, at 508. Thus, the special characteristics of the MBE preference—especially its reasonable overall limit, and its limited duration—were sufficient to satisfy not only the Chief Justice but also Justice Powell that Congress had selected a permissible means.

The instant case bears a striking similarity to *Bakke*, in that the public body which ordered racial discrimination, for purportedly remedial purposes, has no claim to expertise in the field of racial discrimination, and because that body pursued absolutely fixed and rigid racial classifications. This case differs from *Fullilove* in that it does not concern Congress, or Congress' "unique constitutional role in the enforcement of the post-Civil War Amendments," on which *Fullilove* turned. *Id.*, at 516 (Powell, J., concurring). Further, Ordinance 82-67 suffers from precisely the kind of underinclusion and overinclusion which the PWEA carefully avoided, and omits both an overall limit and an expiration date. For all of these reasons, the United States Court of Appeals for the Eleventh Circuit should have held Ordinance 82-67, and its subsequent implementation, to be unconstitutional.[2]

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[2] Focusing on the dispositive opinions in *Bakke* and *Fullilove*, and the dispositive facts, does not guarantee that one will proceed from the analytical center of the several opinions which comprise each of those decisions, but it has far more to commend it than does the only alternative: relying on an artificial construct of where the

A. *The Board of County Commissioners for Dade County, Florida, is Not Competent to Identify Racial Discrimination and/or Fashion Appropriate Remedies.*

The Court of Appeals considered only the Commission's authority to waive competitive bidding, or promote the general welfare, avoiding any serious inquiry into the Commission's competence to determine that Black construction contractors had suffered racial discrimination in their business endeavors. The Court of Appeals also avoided any serious inquiry into the Commission's competence to fashion appropriate remedies—though such remedies would inevitably impose a racial burden on innocent third parties. "[I]solated segments of our vast governmental structures are not competent" to impose racial burdens on third parties, *Bakke, supra*, at 309 (Powell, J., concurring), for they are not "charged with the responsibility" to identify past discrimination, or to fashion remedies, *id.*, at 301. *Cf. Hampton* v. *Mow Son Wong*, 426 U.S. 88 (1976).

Because it limited its inquiry, the Court of Appeals overlooked and neglected the critical fact that the Commission had no special or unique "charge" to identify or remedy racial discrimination. The Commission had no claim to the necessary expertise. Section 5 of the Fourteenth Amendment, U.S. Const. amend. XIV, § 5, speaks only to Congress, "authorizing *Congress* to exercise *its* discretion in determining whether and what Legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966) (emphasis added). *Accord, Ex Parte Virginia*, 100 U.S. 339 (1879). *See* Bohrer, *Bakke, Weber and Fullilove: Benign Discrimination and Congressional*

Bakke and *Fullilove* Courts would have been had they reached a consensus. One cannot honestly reconcile what the Justices of this Court could not reconcile themselves.

Power to Enforce the Fourteenth Amendment, 56 Ind. L. J. 473 (1981).[3]

As a further illustration, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981) (hereinafter "Title VII") expressly empowers the Equal Employment Opportunity Commission to identify and remedy racial and other discrimination in employment, *id.*, at §§ 2000e-5, 2000e-8, 2000e-9, and even requires that federal agency to defer to certain state agencies, *id.*, at § 2000e-5, but Title VII does not confer any special responsibilities for the enforcement of civil rights on the Dade County Commission or its counterparts even in the field of employment. As in the case of the Equal Protection Clause, Title VII serves only to limit the Commission's discretion.

What the facts of this case amply demonstrate is precisely the need for an inquiry into the competence of the body which would compel racial discrimination for ostensibly remedial purposes. The Commission plunged ahead with its "finding" of prior racial discrimination though the statistics had revealed that the construction going to Blacks in 1977 had *exceeded* their availability for that year, and further, they had revealed that the percentage of the Metrorail construction going to Blacks was five times higher than the percentage of all work for 1977.[4]

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[3] Far from a co-equal branch of the federal government, the Commission is a subdivision of a single state. *Compare Fullilove, supra*, at 472 (Burger, C.J., concurring).

[4] The school desegregation cases, *e.g. Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Green* v. *County School Board*, 391 U.S. 430 (1968), are entirely distinguishable from this case. Unlike racial discrimination in the construction industry, racial segregation in public education is readily identifiable. A local school board may have to derive certain figures, but it does not have to interpret those figures. The evil lies in the naked racial imbalance. Moreover, the racial integration of public education does not deprive innocent third parties of any opportunity

B. *The Commission Did Not Make Adequate Findings of Prior Discrimination.*

Bakke and *Fullilove* further required the Court of Appeals to determine that the Commission, even if competent, had nevertheless failed to make adequate findings of prior discrimination. Generalized concern over "societal discrimination" is simply not sufficient. *Bakke, supra*, at 310 (Powell, J., concurring). The single "finding" in the record of this case does not even purport to be more than an assertion of general concern over "our present economic system." [5]

Whether or not the Commission had to identify specific constitutional or statutory violations, it had to identify discrimination in at least some kind of the common sense in which that term is understood. Legally, the term implies something purposeful. *See General Building Contractors Association* v. *Pennsylvania*, 458 U.S. 375 (1982) (§ 1981); *Bakke, supra*, (Title VI); *Washington* v. *Davis*, 426 U.S. 229 (1976) (Equal Protection Clause). *Compare Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (Title VII). As a statistical matter, the term requires

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which they would otherwise have. In ordering such racial integration, local school boards are not imposing significant racial burdens on innocent third parties. Such integration is not a zero-sum game.

[5] At one point, the District Court made its own finding of "identified discrimination." The court adverted to the studies of Dade County, and then volunteered:

> Although "societal discrimination" may be the ultimate cause of the extremely low percentage of Black contractors doing business in Dade County, there is evidence in this record from which the Court can find *identified discrimination* against Dade County Black contractors at some point prior to the county's present affirmative action program. 552 F. Supp. at 925-926 (emphasis in original).

The evidence which the District Court had in its mind remains far from clear, but in any case, the finding is irrelevant to the question presented, for the question goes to the county's conduct, and not the District Court's. The county and not the court ordered racial discrimination against all non-Black contractors.

comparison of at least similar phenomena. One cannot find any evidence of discrimination in the Commission's comparison of total population to construction contractors —a comparison of the unskilled, inexperienced, and even the young, to successful corporate executives. *See Hazelwood School District* v. *United States*, 433 U.S. 299, 308 n. 13 (1977). And even if sound statistical practice were to permit that kind of comparison, the common sense of discrimination would still require at least one specific example of its effect on Black construction contractors. The Commission made *no* meaningful findings of prior discrimination.[6]

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[6] This Court has gone so far as to suggest that "discrimination in the construction trades on racial grounds" is "a proper subject for judicial notice." *United Steelworkers* v. *Weber*, 443 U.S. 193, 198 n.1 (1979). Whether or not such a broad indictment of the construction trades was necessary or appropriate, the fact remains that this case has nothing to do with the construction trades. This case concerns the conduct of unidentified owners or developers, whether public or private, in doing business with general contractors, and further, the conduct of general contractors in doing business with subcontractors. The construction trades represent construction employees, and may encourage owners and developers to use the general contractors with which the trades have collective bargaining agreements. They may also encourage general contractors to use the subcontractors with which they have agreements. The construction trades do not, however, have any direct input into the decisions which lie at the heart of this case.

Even as to employment, with which the construction trades are overwhelmingly concerned, this Court has held that the trades play an independent role. "The entire process of collective bargaining is structured and regulated on the assumption that '[t]he parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self interest.' " *General Building Contractors Association* v. *Pennsylvania, supra*, at 394, *quoting NLRB* v. *Insurance Agents*, 361 U.S. 477, 488 (1960).

C. *The Set-Aside Provision of Ordinance 82-67 And The Board's Use Of That Provision Are Not Tailored to Fit Their Purportedly Remedial Purpose.*

Fullilove teaches that racially remedial programs are fatally underinclusive if they exclude groups which can rightfully claim to have suffered from discrimination to the same degree as the included groups. *Bakke* teaches that such programs are unconstitutional if they are absolutely fixed and rigid, and *Fullilove* further explains that such rigidity can cause the programs to be fatally overinclusive. In *Fullilove* itself, the Secretary of Commerce had created not one but two mechanisms for the enforcement of the specific mandate that the MBE preference go to only victims of racial discrimination. Finally, *Fullilove* teaches that such programs have to be limited in their duration, and otherwise provide assurance that they will not impose an undue burden on innocent third parties. Nevertheless, the Court of Appeals, in upholding the Commission's action, considered only the procedures which the Commission would follow in setting-aside a general contract, the minimum criteria for the Commission's consideration of a set-aside, and the annual review of the ongoing program. Thus, the Court of Appeals avoided the critical issues—however one may characterize the required relationship between means and ends.

The set-aside provision in Ordinance 82-67 is underinclusive both on its face and as applied to the Earlington Heights station, for it reflects the Commission's narrow focus on Blacks, and therefore excludes many groups and individuals which may well have suffered racial discrimination to the same degree as Blacks. The provision draws an invidious line between not only Blacks and Whites, but also between Blacks and other minority groups. Unlike the PWEA, which encompassed not only Blacks, but also the Spanish-speaking, Oriental, Indians, Eskimos and Aleuts, Ordinance 82-67 discriminates against the members of those other minorities.

With equal if not greater certainty, the set-aside provision is also overinclusive, for the provision extends a racial preference to all Black prime contractors, whether or not they have ever suffered any racial discrimination in their business endeavors. Nowhere does the record reveal any procedure for the exclusion of those Black contractors who have had their costs inflated, not by racial discrimination, but by wholly neutral factors. Nowhere does the record reveal any procedure for the Commmission to consider complaints of unjust participation.[7] The ordinance creates a *conclusive* presumption that *all* Black contractors have suffered racial discrimination in their business endeavors.

Further, the implementing regulations completely disregard the possibility that a Black contractor may have never had any contact with Dade County or even the State of Florida. Dade County had no major Black prime contractors. When the Commission implemented the set-side provision, it had to solicit bids from all over the country. How could the Commission plausibly claim that awarding the Earlington Heights station to an Illinois firm would remedy racial discrimination against Dade County residents? [8]

The set-aside provision substitutes a single racial classification for *any* consideration of individual harm.

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[7] The Court of Appeals heavily focused on the administrative procedure which the Commission would follow before setting aside a contract. That procedure does not, however, guard against overinclusion.

[8] By comparison, the Conference Report on the PWEA had specified that the MBE provision before the *Fullilove* Court would be " 'dependent on the availability of minority business enterprises located in the project area.' " *Fullilove, supra,* at 462 (Burger, C.J., concurring), *quoting* S. Conf. Rep. No. 95-110, 95th Cong., 1st Sess. 11 (1977); H.R. Conf. Rep. No. 95-230, 95th Cong., 1st Sess. 11 (1977).

And it ignores any geographical boundaries. And it further ignores any temporal boundaries. The ordinance calls for annual reports, but extends into the indefinite future. The ordinance shifts the political burden of persuasion from the proponents to the *opponents* of racial discrimination. The ordinance may be subject to reassessment and reevaluation, but not *prior to* its further operation—and without providing any other assurance that the review will be the kind of meaningful and intensive review which *Fullilove* contemplates.

Finally, the ordinance provides no assurance that its burden on innocent third parties will reach or maintain reasonable levels. In fact, the ordinance provides no means of even assessing that burden, for it sets no overall limit. Taking the Court of Appeals' approach to the issue, and therefore considering only the impact of any one set-aside, one could reach the conclusion that the set-aside provision does not impose an undue burden on innocent third parties even though the Commission had set-aside 100% of its contracts. The Court of Appeals would permit public authorities readily to escape any kind of meaningful judicial review of the impact of their racial discrimination.[9]

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[9] One further error in the Court of Appeals approach is that it implies that the burden of the set-aside would fall evenhandedly on all non-Black construction contractors. The court's implication was that the set-aside, because less than one percent of the county's annual expenditures on construction, would affect no more than one percent of any one non-Black construction contractor's business. The reality is that the set-aside would have a heavy impact on certain construction contractors, and no impact on others. To begin with, it would target general contractors, and might have no impact on any subcontractors.

The construction industry is not a monolithic whole. Construction comes in an infinite variety, and specialization is often the key

The set-aside provision in Ordinance 82-67, and the Commission's subsequent use of that provision, are both too narrow and too broad to remedy racial discrimination against Dade County residents. The Court of Appeals should have considered the many disparities between the Commission's action and the Commission's ostensible purpose, and further, the Court of Appeals should have recognized the significance of the provision's two omissions: its omission of any expiration date, and its omission of any overall cap on the amount to be set-aside. For all of these independent reasons, the Court of Appeals should have held that the provision, and the Commission's use of the provision, could not pass the means test.

D. *The Subcontract Provision of Ordinance 82-67 And The Commission's Use Of That Provision Are Not Tailored to Fit Their Purportedly Remedial Purpose.*

On its face, and as applied, the subcontract provision is as underinclusive as the set-aside provision. For that reason, and further, because the provision extends into the indefinite future, and sets no overall limit,[10] the Court of Appeals should have also held that the subcontract provision is unconstitutional.

The subcontractor goals are theoretically subject to waiver, in that general contractors failing to meet the

---

to survival. One cannot even begin to assess a set-aside's impact on innocent third parties until one correctly identifies the number of construction contractors which would normally participate in the relevant segment of the market.

[10] The subcontracting goals impose a great burden on not only the subcontractors which find themselves excluded from the relatively narrow markets for their specialties, but also the general contractors which have to assume a great financial risk in taking a marginally competent and inexperienced subcontractor. The general contractor has the ultimate legal responsibility for the completion of the project. If a subcontractor fails to perform, then the general contractor has to compensate for that failure. The financial risks can be tremendous.

goals may assert, in their defense, that they nevertheless made every reasonable effort to meet the goals. Even the Court of Appeals, however, equated the subcontractor goals with the inflexible set-asides. Thus, "[w]hen combined with the general requirement that the prime contractor personally perform twenty-five percent of the contract, [the fifty percent subcontractor goal on the Earlington Heights station] meant that seventy-five percent of the contract was being set-aside solely for Black contractors." 723 F.2d at 849. The Court of Appeals further conceded that "the effect of the 50% figure, although designated a 'goals' provision, is to *set-aside* 50% of the contracts value for Black contractors." *Id.*, at 856 (emphasis in original.) Thus, the subcontract and set-aside provisions both also neglect *Bakke's* most straightforward requirement: that public authorities avoid rigid and inflexible racial quotas.

CONCLUSION

For the foregoing reasons, Amicus AGC respectfully requests the Supreme Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

G. BROCKWEL HEYLIN
Counsel of Record
MICHAEL E. KENNEDY
1957 E Street, N.W.
Washington, D.C. 20006
202/393-2040

Attorneys for
The Associated General Contractors of America, Inc., as Amicus Curiae

No. 83-1872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SOUTH FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., et al.,

Petitioners,

v.

METROPOLITAN DADE COUNTY, FLORIDA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF *AMICUS CURIAE* OF SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

BEN B. BLACKBURN
G. STEPHEN PARKER*
ROBERT B. BAKER, JR.

SOUTHEASTERN LEGAL FOUNDATION, INC.
2900 Chamblee-Tucker Road
Building 4
Atlanta, Georgia 30341
(404) 458-8313

Attorneys for Amicus Curiae
Southeastern Legal Foundation, Inc.

**Counsel of Record*

June 1984

19 pp

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

In accordance with this Court's Rule 36.1, the Southeastern Legal Foundation, Inc. ("Southeastern"), moves the Court for leave to file the attached brief *amicus curiae* in the above case. Concurrent with the filing of this motion, Southeastern has sent the Clerk of this Court a copy of a letter of consent from the South Florida Chapter of the Associated General Contractors of America, Inc. Metropolitan Dade County, Florida has refused consent.

Southeastern supports the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. Southeastern is a non-profit corporation organized for the purpose of advancing public interest viewpoints in adversarial proceedings involving significant issues. Toward that end, Southeastern has participated as *amicus curiae* in a number of cases before this Court over the past eight years. Southeastern participated as *amicus curiae* in the instant case before the Eleventh Circuit Court of Appeals and now wishes to continue that participation before this Court.

Southeastern has filed numerous *amicus curiae* briefs in the federal courts at all levels regarding a wide variety of public interest issues. Expressing its opposition to racial goals and quotas, Southeastern submitted its views to both the Fifth Circuit and the Supreme Court in *United Steel Workers of America v. Weber*, 563 F.2d 216 (5th Cir. 1977), *reversed*, 443 U.S. 193 (1979); filed an *amicus curiae* brief in *Cramer v. Virginia Commonwealth University*, 586 F.2d 297 (4th Cir. 1978); and as *amicus curiae* urged the U. S. District Court for the Northern District of Alabama to initiate its *sua sponte* reconsideration of nationwide steel industry consent decrees, *United States v. Allegheny-Ludlum Industries*, No. CA 74-P-0339-S (N.D. Ala. March 21, 1978). Recently Southeastern submitted an *amicus curiae* brief in the case of *American Subcontractors Association, Georgia Chapter, Inc. v. City of Atlanta*, No. 40937 (argued in the Georgia Supreme Court on May 9, 1984), in which the City of Atlanta's Minority and Female Business Enterprise ordinance was challenged.

Whether exclusive racial set-asides may be used as one means to remedy the effects of past discrimination is an

issue which will directly affect many citizens living in the southeastern United States. There is a pressing need for this Court to examine the plethora of conflicting decisions rendered since *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and to set out a definitive standard by which race-conscious remedial legislative measures may be evaluated.

For the foregoing reasons, Southeastern respectfully urges the Court to grant its motion for leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

BEN B. BLACKBURN
G. STEPHEN PARKER*
ROBERT B. BAKER, JR.

Attorneys for Movant
Southeastern Legal Foundation, Inc.

**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 83-1872

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METROPOLITAN DADE COUNTY, FLORIDA, et al.,

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BRIEF OF *AMICUS CURIAE*

This brief is submitted by the Southeastern Legal Foundation, Inc. ("Southeastern") in support of the petition for certiorari filed by the South Florida Chapter of the Associated General Contractors of America, Inc., et al., No. 83-1872, seeking review of the Eleventh Circuit's decision in *South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, Florida*, 552 F.Supp. 909 (S.D. Fla. 1982), *aff'd in part, rev'd in part*, 723 F.2d 846 (11th Cir. 1984).

INTEREST OF AMICUS

The interest of the Southeastern Legal Foundation and its reasons for participating in this case are set forth in the attached motion for leave to file this brief. That statement of interest is incorporated herein.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case contained in the brief on behalf of Petitioners, South Florida Chapter of the Associated General Contractors of America, Inc.

SUMMARY OF ARGUMENT

By upholding the ordinance challenged in this litigation, the Eleventh Circuit Court of Appeals has sanctioned an exclusive set-aside of a public contract for a defined minority group. The ordinance in question should be held unconstitutional under prior decisions of this Court.

This Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980) established certain limitations and requirements for legislative use of racial classifications to remedy the effects of past discrimination. Those limitations were exceeded in this case, because the challenged ordinance did not contain adequate limitations with respect to duration or percentages, because it singled out a particular racial group and bestowed benefits upon it to the exclusion of other minority groups, and because the ordinance was not enacted by a body competent to utilize race-conscious remedies.

Since this Court's decision in *Fullilove, supra*, there have been numerous and often conflicting decisions by state and federal courts as to the utilization of race-con-

scious remedial measures. The Eleventh Circuit's opinion in this case is in conflict with a 1981 opinion of the Supreme Court of Alabama dealing with the same questions. Without resolution of the conflicts and uncertainties in this area of the law, there will be a lack of uniformity in the decisions of the various courts throughout the country which are called upon to adjudicate challenges to legislation of this type. Clarification by this Court is also necessary to restrain municipalities and other local governmental units from utilization of race-conscious measures where they are not appropriate.

ARGUMENT

I. INTRODUCTION

The petition for certiorari in this case once again presents this Court with the extraordinarily difficult problem of "how to promote equal opportunity for minorities in ways consistent with other key societal objectives and values." A. Sindler, *Racial Preference Policy, the Political Process, and the Courts*, 26 Wayne L.Rev. 1205 (1980). Such cases present the complex "social conundrum of nourishing ethnicity in an effort to starve it." *Vuyanich v. Republic National Bank of Dallas*, 505 F.Supp. 224, 394 (N.D. Tex. 1980) *rev'd* 723 F.2d 1195 (5th Cir. 1984). Fully aware of this Court's having declined several other recent opportunities to address these issues, *e.g.*, *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *reh'g denied*, 712 F.2d 222 (1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 703 (1984), Amicus respectfully urges this Court to review and overturn the lower court's decision in this case, which upholds a governmental use of racial preferences far beyond that sanctioned by a plurality of this Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). (Hereafter "*Fullilove*").

Amicus fundamentally contends that the use of racial criteria sanctioned by the Court of Appeals in this case is inconsistent with this Court's decisions in *Fullilove, supra,* and related cases, because the Dade County ordinance does not satisfy the requirements set forth in those decisions. Further, Amicus urges the Court to review this case because of the growing number of cases in state and federal courts which are producing different results in judicial review of legislative efforts at many levels to utilize racial classifications. As an example of the uncertainty in this area, the lower court did not follow any test set forth by any of the various opinions of the members of the plurality court in *Fullilove,* choosing instead to rely on what the three-judge panel "perceive[d] as the common concerns to the various views expressed in *Bakke* and *Fullilove* . . ." (App. A at 10a). Because the constitutional rights of innocent third parties are affected by any governmental use of racial classifications, there is a need for some degree of uniformity, or at least further guidance from this Court, to enable the lower federal and state courts to adjudicate the difficult issues presented by these cases.

Only recently this Court has reiterated that classifications based upon race are inherently suspect and are in fact likely to "reflect racial prejudice rather than legitimate public concerns . . ." *Palmore v. Sidoti,* ___ U.S. ___, 52 U.S.L.W. 4497, 4498 (April 25, 1984). The instant case presents a situation in which the most exacting scrutiny of the legislative choice, in this case that of a local county government, should be applied.

The Court of Appeals, however, upheld the county's use of racial classifications and overturned the district court's determination that the setting aside of a contract

for a specific public project for a particular racial group was unconstitutional. One of the factors relied upon by the Eleventh Circuit panel was that the racial preference in question affected only a relatively small portion of the entire amount of governmental expenditures for the overall project. (App. A at 18a). Amicus urges this Court not to accept a quantitative analysis of the effects of unconstitutional racial classifications by government. An unconstitutional ordinance is not rendered palatable because only a few citizens are injured in its application.

II. UNDER PRIOR DECISIONS OF THIS COURT, THE DADE COUNTY ORDINANCE SHOULD BE HELD UNCONSTITUTIONAL.

The Eleventh Circuit's decision to uphold the Dade County ordinance sets a unique precedent by allowing government sanctioned 100% minority set-asides. In no other case since the decisions in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (Hereafter "*Bakke*"), and *Fullilove*, have the federal or state courts had to determine the constitutionality of a statute which permitted a single minority group to have exclusive bidding rights for a government contract. Rather than setting aside a percentage of the total contract or contracts which may be let in a year or for a particular project, the Dade County ordinance goes beyond the standard minority business enterprise statute modeled after the federal statute upheld in *Fullilove*, and permits one racial minority to have a monopoly on the bidding for a particular county construction project. This government sanctioned monopoly is anticompetitive and sets a harmful precedent for the future of all affirmative action programs. If the Dade County race-conscious ordinance is allowed to stand, municipalities and cities throughout

the nation can adopt a variety of race-conscious programs of infinite variation, thus creating a serious impediment to competitive bidding in interstate commerce.

The Dade County race-conscious ordinance is a radical departure from previous minority business enterprise statutes because it requires other disadvantaged non-black minorities to bear a disproportionate share of the burden to aid black contractors who have allegedly been victims of discrimination. The ordinance under attack is unique because a single racial minority group benefits from the application of the law. Rather than allowing the Dade County Commission to set aside various construction projects for all "minorities," the ordinance only permits blacks to benefit from the law. (App. A at 23a-33a). This means that in addition to members of the majority suffering a competitive and economic disadvantage, non-black minorities must also suffer.

The excluded minorities are therefore victims of an arbitrary and capricious racial classification. This Court has frequently struck down racial classifications and distinctions as being "odious to a free people whose institutions are founded upon the doctrine of equality." *Loving v. Virginia*, 388 U.S. 1, 11 (1967), quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Notwithstanding the motivation behind the Dade County ordinance, the effect of the ordinance is to further discriminate against non-black minorities. Race becomes an unacceptable classification when a race-conscious remedy designed to aid one minority group results in discrimination against another. Such legislation approaches an unconstitutional "desire to prefer one racial or ethnic group over another." *Fullilove*, 448 U.S. at 497 (concurring opinion by Justice Powell).

The Court of Appeals for the Sixth Circuit has recently upheld the authority of the State Legislature of Ohio to enact a minority business enterprise statute. *Ohio Contractors Association v. Keip*, 713 F.2d 167, (6th Cir. 1983). In discussing the burden imposed upon non-minority contractors by the statute, the Court of Appeals stated:

> It is clear that members of the majority can be required to bear some of the burden which inevitably results from affirmative efforts to rectify past discrimination. Even if it is assumed that the Plaintiffs in this action are innocent of discriminatory conduct themselves, they are part of a group which did reap competitive benefit from past discriminatory practices of the state that have virtually excluded minority contractors from state business. It was within the power of the General Assembly to require the non-minority contractors to assume a reasonable burden. *See Fullilove*, 448 U.S. at 484-85, 100 S.Ct. at 2777-78.

713 F.2d at 173.

Under the Sixth Circuit's decision in *Ohio Contractors*, a non-minority business must bear an increased economic burden when affirmative efforts are made to rectify past discrimination. The underlying rationale would appear to be that the majority must give back some of the competitive benefit they have previously received, due to past discrimination against minorities. Such a rationale for the distribution of the sharing of this burden is inapposite, when innocent non-black minorities are also required to endure the loss of competitive equality in the marketplace for the sake of remedying allegedly discriminatory behavior that they had no part in perpetuating. These minority contractors are thus being forced to assume more than "a reasonable burden" in the case *sub judice*.

Because the Dade County ordinance lacks durational

and percentage limitations, because it grants an exclusive benefit to a single minority group, and because it conflicts in other respects with this Court's decisions in *Fullilove* and *Bakke*, this Court should hold it unconstitutional.

III. THE DECISION BY THE COURT OF APPEALS IS AN EXAMPLE OF THE CONFLICTING OPINIONS BY STATE AND FEDERAL COURTS ON THE USE OF RACIAL CLASSIFICATIONS BY GOVERNMENT; THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THESE CONFLICTS.

Underlying this Court's decision in *Fullilove* was the recognition that the United States Congress had the authority to enact legislation requiring that a portion of government contracts be set aside for minority business enterprises. As stated in Chief Justice Burger's opinion, in applying the rigid standard of review appropriate for any use of racial criteria, "we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution . . ." with the power to provide for the general welfare and to enforce the equal protection guarantees of the Fourteenth Amendment. *Fullilove*, 448 U.S. at 472. The Chief Justice's opinion further stressed that "we pass, not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President." 448 U.S. at 473. The deference to Congressional authority to enact remedial measures was stressed again in stating that "in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." 448 U.S. at 483.

The question of the ability of governmental units below that of the United States Congress to utilize race-conscious remedies has produced a conflict of opinions among the various state and federal courts, as well as among the commentators who have attempted to analyze *Fullilove*. In upholding the authority of the Dade County Commission to enact race-conscious measures granting preferential treatment to black contractors in certain county contracts, the Eleventh Circuit's decision has created a conflict between that court and the highest court of one of the states comprising the Eleventh Circuit on a matter of federal law.[1] Such a conflict, arising directly out of decisions of this Court on federal issues, constitutes yet another reason for this Court to grant the writ of certiorari. *See, e.g., Lego v. Twomey*, 404 U.S. 477, 479 (1972).

In *Arrington v. Associated General Contractors*, 403 So.2d 893 (Ala. 1981), *cert. denied*, 455 U.S. 913 (1982) (Hereafter "*Arrington*"), the Alabama Supreme Court concluded that the City Council of Birmingham, Alabama could not enact a minority business enterprise ordinance, under the standards set forth in *Fullilove*. The Alabama Supreme Court specifically held that a city ordinance requiring a 10% minority business enterprise participation in city contracts was violative of the Equal Protection Clause of the Fourteenth Amendment, under *Fullilove* and *Bakke*, partly because "the Birmingham City Council is not a competent body to identify and address past constitutional or statutory violations . . ." *Arring-*

[1] Although the lower court appeared to analyze this question as one of State law (App. A at 11a-12a), it is clear from this Court's opinions in *Fullilove* and *Bakke* that the authority of the governmental unit to enact such legislation is of critical importance to its constitutionality.

ton, 403 So.2d at 900. Rejecting an argument based upon the City's exercise of limited police powers, the Alabama Supreme Court noted that the ordinance was not imposed under the broad remedial powers of the United States Congress, nor under the equitable jurisdiction of a court. 403 So.2d at 901. Although the *Arrington* decision did not rest exclusively on the ground that the city council was an inadequate body to enact race-conscious legislation, the Alabama Supreme Court's resolution of this issue conflicts with the Eleventh Circuit's, as to the level of government authorized to enact legislation of this type.

In *Ohio Contractors Association v. Keip, supra*, the Sixth Circuit concluded that the General Assembly of the State of Ohio had the authority to enact a minority business enterprise statute. Perhaps a state legislature, elected by the entire population of the State to represent a broad range of groups and interests, is comparable to the U. S. Congress, within the meaning of the *Fullilove* decision. At the county commission level or city council level, however, there should not be a presumption in favor of the legislative resolution of this matter, in which the constitutional rights of non-minorities can be adversely affected.

An Act of Congress, by its nature, has a uniform application throughout the land which is within the grasp of understanding by all potential bidders for federally financed construction. The understanding and uniform application of law attendant to congressional enactments does not exist for city and county ordinances. Local pressures and prejudices unavoidably are reflected in acts of local governmental units. It is imperative that this Court sharply limit the authority to implement race-conscious laws and ordinances to the United States Congress if great confusion and mischief is to be avoided.

Even Acts of Congress must be subject to strict, and limited, application so as to not violate the Equal Protection Clause of the Fourteenth Amendment.

Another even more fundamental conflict between the decision of the Alabama Supreme Court in *Arrington, supra,* and the decision of the Eleventh Circuit below is the application of different standards of review. In *Arrington,* the Alabama Supreme Court chose to apply the more stringent standard of review advocated by Justice Powell in *Fullilove, supra,* and *Bakke, supra.* "We believe that the approach of Justice Powell is fairly representative of a more rigorous standard of review, and for purposes of this opinion we will employ the analytical framework proposed by him." 403 So.2d at 900. This application of a strict scrutiny standard led the Alabama Supreme Court to conclude that the Birmingham ordinance violated the Equal Protection Clause of the Fourteenth Amendment.

In contrast to *Arrington,* the Eleventh Circuit opinion applied a less demanding test than that utilized by the Alabama Supreme Court in *Arrington.* Rejecting a strict scrutiny analysis, the Court summarized its own test as follows:

> We rely instead on what we perceive as the common concerns to the various views expressed in *Bakke* and *Fullilove:* (1) that the governmental body have the authority to pass such a legislation; (2) that adequate findings have been made to insure that the governmental body is *remedying* the present effects of past discrimination rather than advancing one racial or ethnic group's interest over another; and (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination.

(App. A at 10a). (Emphasis by the Court).

The significance of which test is to be utilized should not be understated. By utilizing the less demanding test, the Court below upheld an ordinance permitting a 100% racial set-aside for a specific contract. The Birmingham ordinance, struck down under the strict scrutiny test in *Arrington*, provided for a 10% set-aside for participation by minority business enterprises in various governmental contracts.

In view of the conflict between decisions of the Supreme Court of Alabama and of the Eleventh Circuit Court of Appeals, both with respect to the applicable tests under which race-conscious legislation must be reviewed, and as to the authority of a local governmental unit to enact such legislation, this Court should grant the writ of certiorari and resolve the issues presented by this case. Review by this Court would also serve to provide needed guidance for State and lower federal courts in determining the constitutionality of race-conscious legislation.

CONCLUSION

Southeastern respectfully urges this Court to grant the writ of certiorari to the United States Court of Appeals for the Eleventh Circuit and to reverse the decision of the Court of Appeals.

Respectfully submitted,

BEN B. BLACKBURN
G. STEPHEN PARKER*
ROBERT B. BAKER, JR.

SOUTHEASTERN LEGAL FOUNDATION, INC.
2900 Chamblee-Tucker Road
Building 4
Atlanta, Georgia 30341
(404) 458-8313

Attorneys for Amicus Curiae
Southeastern Legal Foundation, Inc.

**Counsel of Record*

(5)

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Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS METROPOLITAN DADE COUNTY, FLORIDA, ITS BOARD OF COUNTY COMMISSIONERS, COUNTY MANAGER, AND TRANSPORTATION COORDINATOR

ROBERT A. GINSBURG
Dade County Attorney
16th Floor
Dade County Courthouse
73 West Flagler Street
Miami, Florida 33130
(305) 375-5151

By
R. A. Cuevas, Jr.
Assistant County Attorney

51pp

QUESTIONS PRESENTED FOR REVIEW

(1) Whether studies, including a report of the United States Commission on Civil Rights, all of which detail the total lack of participation of Black-owned businesses in Dade County's economy, together with the county's own analysis which demonstrates the consistent underrepresentation of Black contractors in county public works contracts, constitute sufficient bases for a local legislative body's finding of past discrimination against Black contractors.

(2) Whether a local legislative body may adopt a race-conscious program for the purpose of remedying the present effects of past racial discrimination.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

NO. 83-1872

in the Supreme Court of the United States

October Term, 1983

SOUTH FLORIDA CHAPTER of the ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., et al.,

Petitioners,

vs.

METROPOLITAN DADE COUNTY, FLORIDA, et al.,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS METROPOLITAN DADE COUNTY, FLORIDA, ITS BOARD OF COUNTY COMMISSIONERS, COUNTY MANAGER, AND TRANSPORTATION COORDINATOR

STATEMENT OF THE CASE

(i) Course of proceedings and disposition below.

Petitioners are trade associations of non-Black contractors and subcontractors.[1] [App.43a]. They filed suit below challenging Dade County's authority to adopt a race conscious program which seeks to increase participation of Black-owned contractors and subcontractors in county contracts. They also challenged the county's decision under that program to set-aside the Earlington Heights Metrorail station contract for competition solely among Black-owned prime contractors and to require that the bidder make a good faith effort to involve Black-owned subcontractors in 50% of the dollar value of the contract work.

After final hearing, the district court issued a memorandum opinion containing extensive findings of fact and conclusions of law. *South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, Florida*, 552 F. Supp. 909 (S.D. Fla. 1982). The district court struck down the set-aside, but upheld the subcontractor goal. [App.112a]. A declaratory judgment and permanent injunction were entered consistent with the court's opinion.

The county appealed the district court's ruling on the set-aside; the trade associations cross-appealed the

[1]Regarding the ethnicity of Petitioner's membership, the district court held: "Even at this date the plaintiff [South Florida Chapter of Associated General Contractors of America], general contractors, does not have a single Black member (a Black firm had been invited but had not accepted at the time of the final hearing)." [App.76a, n.13].

ruling on the subcontractor goal. The Court of Appeals for the Eleventh Circuit reversed the ruling on the set-aside and affirmed the ruling on the goal, thus upholding the county's program in full. *South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, Florida*, 723 F.2d 846 (11th Cir. 1984).

(ii) **Statement of the facts.**

In the aftermath of the May, 1980, riots in Miami's Liberty City section, several investigations were undertaken by the county and other private and public entities into the underlying causes of these civil disturbances. [App.50a]. Among the factors evaluated were the present extent of Black business activity within the county generally and specifically in relation to doing business with Dade County. *Ibid.* The county study found a statistically significant disparity between the percentage of county contracts received by Black contractors (less than 1% of the total contracts awarded) and the percentage of the county's population that is Black (17%). [App.75a]. Cumulatively, these reports were the bases for the County Commission's legislative finding that Black contractors in Dade County had been the object of racial discrimination. [App.76a]. The district court specifically held that these findings of "*identified discrimination*" (emphasis by the court) were substantiated and that the county had the authority to act in response to such discrimination. [App.76a, 95a]. See p. 13, *infra*.

As a remedial program, the commission adopted Dade County Ordinance No. 82-67 which required a

review of *each* proposed construction contract to determine whether the addition of race conscious criteria, including goals and set-asides, to the bid specifications would foster participation of Black contractors and subcontractors in the *particular* contract work. The district court found that the objective of the county's program:

> ". . . was to remedy the present continuing effects of past racial discrimination and to take affirmative steps to halt the perpetuation of the vicious cycle in which fledgling Black contractors were unable to overcome past discrimination to compete equally with White contractors. The program's specific purpose was to remedy the disabling effects of discrimination that exist in county contracting." [App.75a]

Earlington Heights Station is the first contract to be reviewed under the ordinance.[2] The trial court determined that the county followed the ordinance's

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[2]As found by the district court:

> ". . . Metropolitan Dade County government is a multibillion dollar public concern that expends approximately 620 million dollars annually in outside contracting and enters into thousands of contracts with business enterprises both locally and nationally. These contracts range from inexpensive procurement contracts to multimillion dollar Metrorail transit station contracts." [App.57a].

The County engineer estimated that the cost of the Earlington Heights Station contract should not exceed $6,060,140. [App.70a, n.10].

procedures and that its decision to apply a set-aside and a goal were substantiated.[3] [App.71-2A, 80a].

Having thus found a compelling county interest in remedying the effects of such discrimination, the district court proceeded to determine whether the means selected by the county (a set-aside and a goal) were carefully tailored to accomplish such a remedial purpose. [App.95a]. The district court held that the set-aside provisions were not narrowly tailored and therefore invalid. The goals provisions were upheld.

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[3]At the time this case was considered by the district court, Dade County had spent ten years planning, designing, and building a billion-dollar rapid transit system for the metropolitan Miami area. [App.57a]. *None* of the *prime contractors* on the 44 existing construction and procurement contracts for Metrorail is Black-owned. Earlington Heights is the last of the system's 20 stations to be bid and is located entirely within Miami's Black community. [App.71-2a]. The district court noted that:

> ". . . The county desired to make extraordinary efforts to involve Black contractors in the completion of the north leg of the system located in large part in the local Black community. The Earlington Heights station became the focal point for applying the race conscious measures established by the county."
> [*Ibid.*]

The district court further found that the Earlington Heights Station contract is "a visible symbol of Black participation in the Metrorail system and county construction contracting in general." [Ap.109a].

The Court of Appeals reviewed the county's race-conscious program in light of the criteria expressed in the Court's opinions in *Bakke*[4] and *Fullilove*,[5] i.e.:

1. that the governmental body have the authority to adopt such legislation;

2. that adequate findings have been made to ensure that the governmental body is remedying the present effects of past discrimination rather than advancing one racial or ethnic group's interests over another; and

3. that the use of such classifications extend no further than the established need of remedying the effects of past discrimination. [App.10a]

As a result of its analysis, the Court of Appeals reversed the district court's ruling on set-asides and affirmed its ruling on goals.

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[4]*Regents of the University of Califonia v. Bakke*, 438 U.S. 265 (1978)

[5]*Fullilove v. Klutznick*, 448 U.S. 448 (1980)

REASONS FOR NOT GRANTING CERTIORARI

The Court in *Bakke*[6] and *Fullilove*[7] has already decided the federal questions applicable to this case, i.e.:

1. whether state and local legislative bodies are competent to make findings of past racial discrimination and to adopt remedial race-conscious measures designed to eliminate the effects of such discrimination; and

2. whether studies detailing the total lack of participation of the Black community in Dade County's economy, plus the consistent underrepresentation of Black-owned businesses in the award of county public works contracts, constitute sufficient bases for a finding of discrimination in the construction industry; and

3. whether set-asides and subcontract goals narrowly tailored to eliminate past discrimination in the construction industry are constitutionally permissible.

The Eleventh Circuit expressly recognized and applied the tests articulated by the Court in *Bakke* and *Fullilove*, and their application in this cause is fully consistent

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[6]*Regents of University of California v. Bakke*, 438 U.S. 265 (1978)

[7]*Fullilove v. Klutznick*, 448 U.S. 448 (1980)

with that of other Courts of Appeal. *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167 (6th Cir. 1983).

I

Bakke involved a state race-conscious program designed to increase minority student enrollment at the Davis Medical School. Although the particular program in issue was struck down, a majority of the Court recognized that state and local governments have a compelling interest in eliminating the effects of past racial discrimination.

Thus, Justice Powell stated:

> ". . .The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of racial discrimination."
> 438 U.S. at 307.

Earlier in his opinion, Justice Powell cited with approval two cases involving racial preferences designed to rectify discrimination in the construction industry:

> ". . . Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination. E.g., *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (CA3), *cert. denied*, 404 US 854, 30 L.Ed. 2d 95, 92 S.Ct. 98 (1971); *Associated General*

> *Contractors of Massachusetts, Inc. v. Altshuler,* 490 F.2d 9 (CA1 1973), *cert. denied,* 416 US 957, 40 L.Ed.2d 307, 94 S.Ct. 1971 (1974). . . ." (last citation omitted) (footnote omitted) 438 U.S. at 301-2.

The *Altshuler* case referred to in the preceding quotation, involved Massachusett's imposition of minority hiring goals on state-funded construction contracts. The First Circuit held the state's race-conscious program was not violative of the Equal Protection Clause of the Fourteenth Amendment. In so holding, the court noted that Congress' policy in the area of affirmative action was "one of encouraging state cooperation and initiative in remedying racial discrimination." 490 F.2d at 15.

Justice Brennan (joined by Justices White, Marshall, and Blackmun) also spoke in *Bakke* to state and local government's competency to remedy racial discrimination.

> "The Court today, in reversing in part the judgment of the Supreme Court of California, affirms the constitutional power of Federal and State Governments to act affirmatively to achieve equal opportunity for all. . . . Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area."
> 438 U.S. at 324-5.

Thus, five Justices in *Bakke* recognized the competence of state and local legislative bodies to make findings of past racial discrimination and to take appropriate remedial race-conscious steps to eliminate the effects of such discrimination.

In the instant case, the Eleventh Circuit determined that the Board of County Commissioners of Dade County was competent "to make findings of past discrimination and to enact remedial legislation." 723 F.2d at 852. [App.12a]. The court relied for its holding on the broad powers granted the County Commission under the Florida Constitution, Statutes, and the Dade County Home Rule Charter. *Ibid.* Those powers are set forth in the district court's opinion and specifically include the authority to:

> " 'a. Conduct studies of county population, . . . facilities, resources, and needs and other factors which influence the county's development, and on the basis of such studies prepare such . . . reports . . . for the . . . economic . . . development of the county.' Section 4.07.
>
> 'b. Make investigations of county affairs, inquire into the conduct, accounts, records, and transactions of any department or office of the county, and for these purposes require reports. . . .' Section 1.01A(20).
>
> 'c. Prepare and enforce comprehensive plans for the development of the county.' Section 1.01A(5).

'd. Use public funds for the purposes of promoting the development of the county. . . .' Section 1.01A(15).

'e. Provide and operate . . . public transportation systems.' Section 1.01A(2).

'f. Adopt such ordinances and resolutions as may be required in the exercise of its powers. . . .' Section 1.01A(22).

'g. Perform any other acts consistent with law which are required by this Charter or which are in the common interest of the people of the county.' Section 1.01A(23)"
552 F. Supp. at 934; [App. 93a-94a].

The district court further noted that under Florida law, "a county commission functions as a legislative body in making county policy and enacting local law." *Ibid.;* [App.94a].

Both the district court and the Eleventh Circuit observed that the County Commission relied on the findings of a number of independent investigations regarding the Black community's total lack of participation in Dade County's economic development. One such report was the June, 1982, report of The United States Commission on Civil Rights entitled, "Confronting Racial Isolation in Miami." 723 F.2d at 858; 552 F.Supp. at 919; [App.24a, 62a]. The United States Commission on Civil Rights is an agency established by Congress under P.L. 85-315, as amended, (42 U.S.C.A. §1975, *et seq.*) to:

"Study and collect information concerning . . . *discrimination* . . . because of race. . . .

* * *

Serve as a national clearinghouse for information in respect to *discrimination* . . . because of race. . . ." (emphasis supplied) 42 U.S.C.A. §1975c(a)(2) & (4)

The Commission on Civil Rights June, 1982, report at pages 25-26 found:

". . . Black exclusion from the economic renaissance [of Miami] translates into low earnings, high unemployment rates, reduced job opportunities, and the absence of capital formation and investment ventures. This lack of a black economic base, in either employment or ownership or a combination of both, has significant long-term implications for the black community. . . .

". . . Underlying the violence that exploded in May 1980 was a sense of the black community's inability to produce change or affect fate. Even now, two years after the violent civil disturbances, that sense of powerlessness remains. In the booming local economy, as the memory of civil disorders recedes, the interest, activities, and concern for the black community fade away."

The Commission report at pages vi-vii further cautioned:

> ". . . unless a *racially conscious effort* is made to overcome the social and economic disadvantages imposed on black Miamians and to offer them the opportunity to develop a prosperous community again, the present sense of alienation and frustration will continue to pervade black life in Dade county."
> (emphasis supplied)

Since Congress created the United States Commission on Civil Rights for the express purpose of examining and compiling evidence of racial discrimination, and since the Board of County Commissioners relied in substantial part on The Commission on Civil Rights' findings and its recommendation for a "racially conscious effort" in Dade County, any argument that the challenged program is not based on recommendations of a body with responsibility in the area of racial discrimination must fail.

II

Fullilove involved a provision of the Public Works Employment Act of 1977 which required that, absent an administrative waiver, ten percent of the grant funds for each federally-assisted local project must be expended with minority business enterprises. In upholding the provision, the Court discussed the nature of the legislative process and what constitutes a sufficient basis for a legislative finding of racial discrimination in the context of public works contracting.

The Chief Justice (joined by Justices White and Powell) stated:

> "With respect to the MBE provision, Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination. Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings. Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination and which continue today, even absent any intentional discrimination or other unlawful conduct. Although much of this history related to the experience of minority businesses in the area of federal procurement, there was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well."
> 448 U.S. at 477-8

The Court in *Fullilove* expressly found that various studies and statistics which compared the composition

of the population to the percentage of federal contracts that went to minorities justified the ten percent set-aside imposed by the Public Works Employment Act (PWEA) of 1977. Thus, the Chief Justice noted that the House sponsor of the Act's set-aside provisions:

> ". . . cited the marked statistical disparity that in fiscal year 1976 less than 1% of all federal procurement was concluded with minority business enterprises although minorities comprised 15-18% of the population."
> *Id.* at 459.

Additionally, the Chief Justice quoted from a report of the House Sub-committee on Small Business Administration Oversight and Minority Enterprise which found:

> " '. . . While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only . . . 3.0 percent are owned by minority individuals. . . ."
> *Id.* at 465.

Justice Powell also stated:

> "I believe that a court must accept as established the conclusion that purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority

business enterprises have received."
Id. at 506.[8]

Finally, Justice Marshall (joined by Justices Brennan and Blackmun) found:

> "Congress had a sound basis for concluding that minority-owned construction enterprises, though capable, qualified, and ready and willing to work, have received a disproportionately small amount of public contracting business because of the continuing effects of past discrimination."
> *Id.* at 520.

Similarly, in the instant case, the district court found from the evidence presented there had been:

> " . . . *identified discrimination* against Dade County Black contractors at some point prior to the county's present affirmative action program. In reaching this conclusion the Court has relied on the following points:

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[8]As noted above, Justice Powell relied in *Bakke* (at 301-2) on the First Circuit's decision in *Associated General Contractors of Massachusetts v. Altshuler*, 490 F.2d 9 (1st Cir. 1973) for the proposition that racial preferences had only been upheld where a prior finding of discrimination had been made. In *Altshuler*, the disparity between the percentage of Boston's population that were minorities (23%) and the percentage of union membership that were minorities (4%) was held to be a sufficient basis to support Massachusett's finding of racial discrimination in the construction industry.

a. The record indicates that less than one percent of Dade County contractors are Black even though the overall Black population exceeds seventeen percent. The only plausible explanation for this statistical disparity is that Black contractors in Dade County continue to suffer from the present effects of past discrimination against them.

b. The construction industry nationally has been particularly slow to open itself to racial minorities. '[R]acial discrimination in the construction trades on racial grounds has been found so often by the courts as to make it a proper subject for judicial notice.' *Local Union No. 35 etc. v. City of Hartford*, 625 F.2d 416, 422 (2d Cir.1980), *cert. denied*, 453 U.S. 913, 101 S.Ct. 3148, 69 L.Ed.2d 997 (1981).

c. The extremely low percentage of county contracts awarded to Blacks in the past. While to a certain extent this is explainable by the low percentage of Black contractors available in the area, to a larger extent, this low percentage is a present effect of past discrimination against Black contractors."
(emphasis by the Court) (footnotes omitted) 552 F.Supp. at 926; [App. 76-7a]

The Eleventh Circuit further noted that the County Commission's actions were based on " 'reliable, substantial information compiled by independent investigations' " which revealed that past discriminatory practices had impeded the development of Black-owned businesses,

resulting in an economic disparity between Black and other groups in the county. 723 F.2d at 853; [App.12a].

Petitioner has argued at each stage of these proceedings that there is an insufficient basis for the County Commission's findings of discrimination. On this point, the district court held:

> "Contrary to Plaintiffs' contention, the information contained in these reports do provide a substantial basis for the actions taken by the county commission, including the implementation of race-conscious measures and the Court made a finding to this effect. Indeed, plaintiffs do not even suggest what additional better information the commission could have relied on in making its findings that Blacks have not proportionately shared in the county's economic development."
> (footnote omitted) 552 F.Supp. at 934; [App.95a]

III

Fullilove upheld the authority of Congress to utilize a ten percent set-aside for the purpose of eliminating past discrimination against minority businesses in the construction industry. A majority of the Court held that, having made sufficient findings of past discrimination, the legislature's choice of remedy to redress discrimination must be upheld where that remedy is narrowly tailored to accomplish the legislative objectives. Thus, the Chief Justice (joined by Justices White and Powell) stated that a race-conscious program must be

> ". . . narrowly tailored to achieve its objectives, subject to continuing evaluation and reassessment; administration of the programs must be vigilant and flexible; and, when such a program comes under judicial review, courts must be satisfied that the legislative objectives and projected administration give reasonable assurance that the program will function within constitutional limitations."
> 448 U.S. at 490

Similarly, Justice Marshall (joined by Justices Brennan and Blackmun) held the determinative issues to be:

> ". . . whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives."
> *Id.* at 519

The Eleventh Circuit recognized and expressly applied the "narrowly tailored" test adopted in *Fullilove* to the instant case:

> ". . . We must next consider whether the Dade County ordinance facially incorporates sufficient safeguards to ensure that it is narrowly tailored to its legitimate objectives of redressing past discrimination. After a careful review of the legislative provisions, we find that adequate safeguards exist to uphold the ordinance's constitutionality."
> 723 F.2d at 853; [App.12a]

The Dade County ordinance required the County Manager to establish an administrative procedure for review of each proposed county construction contract to determine whether the inclusion of race-conscious measures in the bid specifications will foster participation of "qualified Black contractors and subcontractors" in the contract work. *Id.* at 858; [App.25a]. The administrative procedure adopted required each county department to develop a recordkeeping system as to the dollar value of construction contracts anticipated and a goal for Black contractor participation for that fiscal year. Regs. 1.01; [App.27-8a]. In the course of developing contract specifications for each capital project, the department must analyze the trades classifications required for the project and the number and types of Black-owned firms likely to be available to participate in the contract. Regs. 1.02; [App.28a]. In light of this analysis, the department is required to make a suggestion as to whether the contract is appropriate for set-aside, subcontractor goals; or whether "no race-conscious requirements" should be imposed. Regs. 1.03; [App. 28a]. Next, the department's suggestions are reviewed by a three-member Contract Review Committee which formulates a recommendation on the advisability of the inclusion of race-conscious measures for the construction contract in question, prior to preparation of the contract specifications. Regs. 2.04 and 2.06; [App. 29a]. The recommendation is then forwarded to the Board of County Commissioners.

The ordinance and regulations also set out the criteria to guide the reviewing bodies as to whether goals or set-asides are appropriate. Subcontractor goals must be based on estimates of the project's subcontracting opportunities and on the "availability and capability of

Black subcontractors to do the work." Ord. 10-38(d)(1); Regs. 4.02 and 4.03; [App.25a, 30a]. When goals are utilized, the low bidder, as a condition of award, must either meet the goal or demonstrate that he made every reasonable effort to meet the goal and, notwithstanding such effort, was unable to do so. Ord. 10-38(d)(1); [App. 25a]. The latter procedure provides a means for waiver where the goal is unattainable. A set-aside may be used only upon findings that at least three Black prime contractors "with capabilities consistent with the contract" are available and the County Commission specifically determines by two-thirds (⅔) vote that the set-aside is in the best interest of the County. Ord. 10-38(d)(2); Reg. 5.01; [App.26a, 30-1a].

In addition to the three-tiered review of each construction contract where race-conscious remedies are proposed, the entire program is also subject to periodic review and assessment. The County Commission must annually reassess the continuing desirability and viability of the program. Ord. §10-38(e); [App.26a]. This reassessment is in part based upon an annual report by the County Manager reporting the percentage value of county construction contracts awarded that year to Black contractors and subcontractors. *Ibid.* The County Manager is also charged with the duty of continually monitoring the program's use and periodically reporting his findings. Resol. §3; [App.23a].

Dade County's program is not as exclusionary as the program in issue in *Bakke*, nor is it as arbitrary as the ten percent set-aside upheld in *Fullilove*.

In *Bakke*, the class slots reserved under the Davis Medical School's special admissions program were limited

solely to minority students. As a result, non-minority students were totally excluded from consideration for these positions. Under Dade County's program, however, the application of a set-aside does not preclude white and other non-Black contractors from participating in the construction contract. This is so because the Dade County Ordinance defines a "Black contractor" in terms of ownership and control by Blacks of 51% of the business. 723 F.2d 858; [App.24-5a]. Thus, non-Black contractors may participate by having up to 49% ownership or control of the business, by joint venturing with a Black prime contractor and by bidding successfully for subcontracts awarded by Black prime contractors. The district court specifically noted that non-Black contractors could participate in a set-aside contract through joint venturing, as evidenced by the fact that one of the bidders on the very contract in issue was a joint venture which included a non-Black contractor.

> ". . . While non-Black businesses could have participated in The Earlington Heights project as part of a joint venture and, in fact one of the bidders appears to be a joint venture, a joint venture would require that the Black-owned firm have at least fifty-one percent control over the project."
> 552 F. Supp. at 926; [App.78a]

See also, 552 F. Supp. 935, n. 38 [App.96a].

In *Fullilove*, a blanket and automatic 10% set-aside was imposed on all contracts with provision for administrative waiver after the fact. Under Dade County's program, each contract is individually reviewed in light of the unique characteristics of the particular project

to determine whether race-conscious measures are even appropriate to that specific contract. The county's procedures require that an in-depth analysis of the availability and capability of qualified Black contractors and subcontractors to do the precise work envisioned by the contract be made *before* a goal or set-aside can even be recommended. Where a goal is applied, the percentage is not fixed, but rather is set based on considerations relevant to the particular contract. Set-asides may only be applied where there are "sufficient licensed Black contractors to afford effective competition for the contract." Ord. §10-38(3)(d)(2); [App.26a]. The County Commission must then determine by two-thirds (⅔) vote whether a set-aside is in the best interests of the county. Considerations relevant to waiver are thus built into the county's initial review procedure and are applied on a contract-specific basis to each contract. In the instant case, the district court found that the county followed the procedures required by the ordinance and that the county's findings thereunder as related to the Earlington Heights Station contract were substantiated. [App.71a-72a].

In light of all the above, the Eleventh Circuit found:

> ". . . That these extensive review provisions provide adequate assurances that the County's program will not be used to an extent nor continue in duration beyond the point necessary to redress the effects of past discrimination.

* * *

Our conclusions on the adequacy of the program's safeguards are premised on the understanding that the review process, both for individual contracts and the entire program, will be conducted in a thorough and substantive manner. If the process is carried out in a conclusory fashion or extended beyond its legitimate purpose of redressing the effects of past discrimination, the plaintiffs may of course renew their challenge to the constitutionality of the County's program. We decline to hold the ordinance facially unconstitutional, however, merely on the speculation that the County will not vigorously undertake implementation of the review procedure."
Id. at 854; [App.14-15a]

CONCLUSION

For the reasons stated and upon the authorities cited, the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT A. GINSBURG
Dade County Attorney
16th Floor
Dade County Courthouse
73 West Flagler Street
Miami, Florida 33130
(305) 375-5151

By: R. A. Cuevas, Jr.
R. A. Cuevas, Jr.
Assistant County Attorney
Counsel of Record

No. 83-1872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SOUTH FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL.,
PETITIONERS,

v.

METROPOLITAN DADE COUNTY, ET AL.,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN OPPOSITION TO CERTIORARI

LAURENCE S. FORDHAM*
RICHARD W. BENKA
GERALD L. NEUMAN
FOLEY, HOAG & ELIOT
One Post Office Square
Boston, Massachusetts 02109
(617) 482-1390
WILLIAM L. ROBINSON
NORMAN J. CHACHKIN
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212
Attorneys for Amicus Curiae

* Counsel of Record

Blanchard Press, Inc., Boston, Mass. — Law Printers [617] 426-6690]

QUESTIONS PRESENTED

1. Whether a legislative body, after making findings that blacks have been excluded from public contracting opportunities as a result of past racial discrimination, may adopt an administrative procedure under which racial contracting goals and set-asides are recommended to that body for its further consideration.

2. Whether a legislative body, after making such findings, may adopt a racial set-aside and subcontracting goals for a single construction project within a massive public works program.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

REGULATIONS:

MISCELLANEOUS

INTEREST OF AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of President John F. Kennedy to involve private attorneys in the national effort to assure civil rights to all Americans. Through its national office in Washington, D.C. and its local offices nationwide, the Lawyers' Committee has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in education, employment, voting, housing, municipal services, access to government services, the administration of justice, and law enforcement.

The Lawyers' Committee has previously addressed the issue of race-

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* Letters from counsel for the parties, consenting to the submission of this brief, have been filed with the Clerk.

conscious affirmative action programs in its amicus briefs in DeFunis v. Odegaard, 416 U.S. 312 (1974), Regents of the University of California v. Bakke, 438 U.S. 265 (1978), United Steelworkers v. Weber, 443 U.S. 193 (1979), and Fullilove v. Klutznick, 448 U.S. 448 (1980). The Lawyers' Committee has strongly supported vigorous action by the executive and legislative branches to remedy discrimination and its effects. This Court's decision in Fullilove, upholding legislative power to adopt affirmative action remedies in public construction contracting, has enabled government authorities to increase minority participation in an industry notorious for its history of discrimination. The Lawyers' Committee believes that granting review in the present case would not assist the Court in resolving open questions concerning

affirmative action, because the case involves a routine application of Fullilove to a county legislative body's adoption of affirmative action at a single construction project in a city where blacks have suffered a tragic deprivation of economic opportunity.

STATEMENT OF THE CASE

Petitioners challenge actions taken by the legislative body of Metropolitan Dade County, Florida, after it concluded that existing programs were insufficient to remedy the effects of a long history of public and private discrimination against its black community. The history of those actions was as follows:

The Board of County Commissioners of Metropolitan Dade County (the "County Commission") is the legislative body for the county, empowered by the State of Florida to enact local laws for the general welfare of the county. App. at 47a, 94a.[1] In 1980 violent civil disturbances in Miami brought to the County Commission's attention the gross economic disparities between the black

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[1] The Appendix to the petition is cited herein as "App."

community and the white and Hispanic communities. The County Commission considered the evidence compiled in a series of independent reports, and concluded that past discriminatory practices had impaired the competitive position of businesses owned and controlled by blacks. App. at 54a n.7. It also concluded that, without specific race-conscious measures, black-owned enterprises would not be able to participate significantly in county contracting business. Id. The County Commission therefore enacted Resolution No. R-1672-81, adopting in general terms a "policy of developing programs and measures to alleviate the problem of lack of participation of Blacks in the County's economic life and to stimulate the local Black economy, including specific race conscious measures." Id.

This Resolution was enacted in November 1981, but had no direct effect without further action by the County Commission. App. at 56a.

The United States Commission on Civil Rights issued a lengthy report on Miami in June 1982. App. at 50a n.6. It documented the effects of unlawful public and private discrimination on Miami's black community, and concluded that blacks "as individuals and as a community have been excluded from the economic mainstream in Miami." U.S. Comm'n on Civil Rights, Confronting Racial Isolation in Miami 18 (1982). Among the causes identified were Dade County's unlawful dual school system, remnants of which still persist in the inner city, id. at 27, 34; present and past discrimination against black entrepreneurs, id. at 79-81; intentional discrimination

by both public and private employers against blacks, id. at 124-26; and racial discrimination in the building trades by unions and public licensing authorities, id. at 136. The report specifically criticized the "minimal involvement" of black businesses in construction of Dade County's rapid transit system, the very program involved in this case. Id. at 117-23. Finally, the report emphasized that existing affirmative action programs were inadequate to restore equal economic opportunity to the black community, in part because of Dade County's unusual ethnic situation: the county has a large Hispanic community that has shared successfully in its economic growth, but applicable guidelines direct affirmative action toward minorities in general

rather than targeting it toward blacks in particular. Id. at 180-90.

The County Commission adopted the U.S. Commission's report as part of the legislative findings underlying its two subsequent enactments. App. at 62a, 63a n.8, 72a n.11.

The County Commission enacted Ordinance No. 82-67 (which petitioners call the "race conscious ordinance") in July 1982. App. at 61a. The Ordinance, together with regulations issued under it, establishes an administrative procedure by which county administrators submit to the County Commission recommendations for the adoption of racial goals or set-asides for county construction projects. App. at 62a-67a & nn. 8 & 9. On each county construction project, the responsible department is to recommend whether (and if so, which)

race-conscious measures should be implemented. A three-member contract review committee scrutinizes each proposal, and submits a final recommendation to the County Commission. Any goals recommended must "relate to the potential availability of Black-owned firms in the required field of expertise." App. at 67a & n.9. Set-asides may be recommended only where at least three black prime contractors are available to perform the contract.[2] Id. No contractor can receive more than one set-aside at a time or more than three set-asides within a year. Id. Once the recommendation passes the

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[2] Before the County Commission enacted this procedure, the county manager consulted with the administrator of the Urban Mass Transportation Administration. The County tailored its procedure to ensure consistency with federal regulations imposing affirmative action on federally-assisted mass transit construction, including the Dade County rapid transit project. App. at 61a, 67a; see 49 C.F.R. Part 23.

contract review committee, it is submitted to the County Commission for its consideration. The County Commission must enact each goal or set-aside individually, after finding that the measure is in the best interest of the county and voting by a two-thirds margin to waive the normal bidding procedure. Id; App. at 72a n.11. The County Manager is required to report annually on the percentage of county business awarded to black contractors, and the County Commission is to review annually the need for continued submission of recommendations for goals and set-asides. App. at 63a n.8.

The County Commission enacted a single racial set-aside and goal in October 1982. App. at 71a. It designated the Earlington Heights rapid transit station, the last remaining unbid

site on a twenty-station construction project, as set aside for bidding by black prime contractors. Id. The station was a $6 million project, constituting less than one percent of the county's annual contracting expenditures, and slightly more than one-half of one percent of the total rapid transit project. App. 18a & n.13. The County Commission also imposed a fifty-percent black subcontracting goal for the station. Id. Resolution No. R-1350-82, enacting the set-aside, incorporated and adopted as the County Commission's legislative findings the findings and reports described above. App. at 72a n.11. The County Commission specifically found that the black business community "cannot be expected to receive any significant amount of the public funds to be expended on this contract in the absence of such

race conscious measures." Id. The Resolution also adopted the Contract Review Committee's findings that there were sufficiently many black contractors available to compete effectively for the contract and to perform the construction. App. at 71a, 72a n.11. The resolution was enacted by the two-thirds vote required under the county charter for waiver of formal bidding. App. at 72a n.11.

Petitioners, a group of contractor trade associations, filed suit in November 1982 to enjoin the implementation of any race-conscious bidding procedure on the Earlington Heights project. App. at 44a. The United States District Court for the Southern District of Florida enjoined the prime contractor set-aside, but permitted the county to enforce the subcontracting goals. App.

at 110a-111a, 114a-115a. On appeal and cross-appeal, the United States Court of Appeals for the Eleventh Circuit upheld the County Commission's actions in their entirety, both facially and as applied to the Earlington Heights project. App. at 20a. The court of appeals denied petitioners' request for en banc consideration, without any circuit judge voting for rehearing. App. at 36a.

REASONS FOR DENYING THE WRIT

There is no reason for the Court to disturb the unanimous judgment of the court of appeals upholding this minor and unobjectionable instance of affirmative action in public contracting. The severe economic deprivation of Dade County's black community, and its long history of subjection to public and private racial discrimination amply justify the county legislative body's decision to adopt race-conscious contracting procedures for a single rapid transit construction project.

No more is involved in this litigation. Contrary to petitioners' urgings, Dade County has created no program of racial set-asides and goals, unlimited in time and quantity. The "race conscious ordinance" petitioners challenge is merely an elaborate administrative procedure for generating recommendations

for future legislative action. The only racial set-aside or goal actually evidenced in the record is the Earlington Heights project. As the court of appeals found, that single set-aside is well within constitutional limits in all respects.

The Lawyers' Committee believes that the writ should be denied because: (1) the case simply does not present the broad issues that petitioners describe, concerning "unlimited" goals or set-asides; (2) the decision upholding the County Commission's set-aside of the Earlington Heights station conflicts with no precedent of this Court or of the courts of appeals; (3) petitioners' attacks on the "competence" of the County Commission present issues purely of state law; and (4) petitioners' challenge to the necessity for adopting the set-aside and goals is a factual dispute not warranting review.

I. THIS CASE DOES NOT INVOLVE, AS PETITIONERS CLAIM, UNLIMITED IMPOSITION OF GOALS AND SET-ASIDES, BUT RATHER ONLY A LEGISLATIVE ADOPTION OF GOALS AND A SET-ASIDE FOR A SINGLE CONSTRUCTION PROJECT.

Petitioners purport to challenge Ordinance No. 82-67 not only as applied to the Earlington Heights construction project, but also on its face. They characterize it in their petition as an ordinance that the county government has enacted to authorize itself to impose race-conscious measures in "any (and every) county construction contract." Petition at (i). In fact the Ordinance does no such thing.

Even petitioners recognize that Ordinance No. 82-67 itself imposes no goals or set-asides. It merely sets up an administrative procedure by which proposals for goals or set-asides may be generated within county departments, administratively reviewed, and then

submitted to the County Commission for its consideration. Nor did the County Commission somehow "authorize" itself through the Ordinance to impose race-conscious award procedures -- the County Commission is a legislative body, and its authority to require contracting goals or set-asides is wholly independent of the enactment of a prior ordinance. Ordinance No. 82-67 is merely a procedural device for generating recommendations for future county legislation, and future set-asides (if any) can occur only after further legislative consideration and action.

The only race-conscious contracting procedures presented in this case are the goals and set-aside on the Earlington Heights project. The Resolution creating the goals and set-aside was a discrete legislative action targeting a minuscule

portion of the county's contracting business for black contractors for a limited period of time: the time it would take to award and construct the Earlington Heights station. No other goal or set-aside is before this Court.

Petitioners thus err when they attempt to measure Ordinance No. 82-67 "on its face" against standards derived from this Court's decision in Fullilove v. Klutznick, 448 U.S. 448 (1980). That decision involved federal legislation actually imposing minority set-asides and delegating authority to administrators to decide whether set-asides should be enforced or waived. The federal statute created racial set-asides without any further intervention of the legislature. Accordingly, this Court concerned itself with the lifespan of the legislation, the substantive limits placed on administrative

action, and the nature of the administrative procedures employed in implementing the statute.

The Dade County Ordinance, in contrast, generates only recommendations for legislative consideration. It does not bind the County Commission to adopt or reject the recommendations; indeed, in American jurisprudence legislative bodies cannot commit themselves to future legislation. Glidden Co. v. Zdanok, 370 U.S. 530, 534 (1962); Toomer v. Witsell, 334 U.S. 385, 393 n.7 (1948); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810).

The constitutional challenge to Ordinance No. 82-67 "on its face" is therefore frivolous. The Federal Constitution does not dictate procedures that must be followed in the exercise of legislative power by the States. Townsend v. Yeomans, 301 U.S. 441, 451-52 (1937) (Hughes, C.J.); Bi-Metallic

Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915) (Holmes, J.); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810) (Marshall, C.J.); see City of Eastlake v. Forest City Enterprises, Inc. 426 U.S. 668, 676-77 (1976) (Burger, C.J.). The Ordinance itself affects no rights, and a challenge to conceivable future legislation would be speculative and premature. Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 230 (1908) (Holmes, J.) ("they should make sure that the state, in its final legislative action, would not respect what they think their rights to be, before resorting to the courts of the United States"); Rescue Army v. Municipal Court, 331 U.S. 549 (1947).

The only constitutional question truly presented on the present record is whether the legislative designation of

Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915) (Holmes, J.); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810) (Marshall, C.J.); see City of Eastlake v. Forest City Enterprises, Inc. 426 U.S. 668, 676-77 (1976) (Burger, C.J.). The Ordinance itself affects no rights, and a challenge to conceivable future legislation would be speculative and premature. Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 230 (1908) (Holmes, J.) ("they should make sure that the state, in its final legislative action, would not respect what they think their rights to be, before resorting to the courts of the United States"); Rescue Army v. Municipal Court, 331 U.S. 549 (1947).

The only constitutional question truly presented on the present record is whether the legislative designation of

the Earlington Heights project for goals and set-asides, in the context of the County Commission's prior resolutions, ordinances, and findings, violated the Fourteenth Amendment.

II. THE JUDGMENT BELOW IS WHOLLY CONSISTENT WITH THE DECISION OF THE OTHER COURTS OF APPEALS AND OF THIS COURT.

There is no conflict to be resolved by this Court. Regardless of how the County Commission's actions are characterized, the court of appeals judgment upholding them is consistent with every decision of the courts of appeals and this Court in similar or related cases.

The legality of government contracting set-asides in the construction industry is hardly a novel issue. The Eleventh Circuit's decision joins precedents of this Court[3] and the courts of

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[3] Fullilove v. Klutznick, 448 U.S. 448 (1980).

appeals for the First,[4] Second,[5] Third,[6] Sixth,[7] and Ninth[8] Circuits approving such programs on the federal, state, and local level. As this Court observed in United Steelworkers v. Weber, 443 U.S. 193, 198 n.1 (1979), "[j]udicial findings of exclusion from crafts on racial

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[4] Associated General Contractors of Massachusetts, Inc., v. Altshuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974).

[5] Local Union No. 35 v. City of Hartford, 625 F.2d 416 (2d Cir. 1980), cert. denied, 453 U.S. 913 (1981).

[6] Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971).

[7] Ohio General Contractors Association v. Keip, 713 F.2d 167 (6th Cir. 1983).

[8] Schmidt v. Oakland Unified School District, 662 F.2d 550 (9th Cir. 1981), vacated on other grounds, 457 U.S. 594 (1982). This Court remanded the case for resolution of a possibility dispositive state law issue. No further opinions have been reported.

grounds are so numerous as to make such exclusion a proper subject for judicial notice." Congress has made comprehensive findings based on numerous studies describing the past discrimination in the construction industry nationwide and the resulting barriers to minority business participation in the construction industry. See Fullilove v. Klutznick, 448 U.S. 465-67 (opinion of Burger, C.J.); 448 U.S. at 520 (opinion of Marshall, J.). Those findings were supplemented, with specific reference to Dade County, by a series of local studies and a report of the United States Commission on Civil Rights, all cited and incorporated in the County Commission's Resolution adopting the Earlington Heights set-aside. See pages 6 to 9 supra. Both the district court and the court of appeals examined these studies and concluded that they

amply supported the County Commission's determination that race-conscious contracting measures were necessary. App. at 95a; App. at 12a-13a.

Petitioners wrongly describe the Dade County contracting policy as based solely on findings of "societal discrimination." Petition at (i). The findings adopted by the County Commission demonstrate that past intentional discrimination by the county itself and by the city of Miami contributed to the current educational and economic deprivations of Dade County's black citizens. Although the County Commission's actions could be sufficiently justified as an exercise of its general legislative powers to remedy the effects of private and "societal" discrimination within the county, in fact their justification is far stronger.

Petitioners purport to find a conflict between the judgment below and

this Court's decision in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), on the supposition that a duly constituted county legislature is "on the low end of the scale" when it comes to judicial deference. Petition at 16. In fact, Justice Powell's opinion in Bakke turned on the distinction between a limited-purpose administrative body like a university board of regents and legislative or administrative bodies empowered to identify and remedy discrimination. 438 U.S. at 301, 309-10.

Since both courts below have determined that the legislative body for Dade County is so empowered under Florida law, it is fully entitled to the deference this Court has always afforded to state lawmaking bodies. State and local governments, no less than Congress itself, are authorized to redress public

and private discrimination. See, e.g., Washington v. Seattle School District No. 1, 458 U.S. 457; United Jewish Organizations v. Carey, 430 U.S. 144 (1977); Ohio General Contractors Association v. Keip, 713 F.2d 167, 172 (6th Cir. 1983).[9]

Finally, the judgment of the court of appeals is consistent with both the holding and the reasoning of Fullilove v. Klutznick, 448 U.S. 448 (1980), upholding Congress' own contractor set-aside program. The evidence of prior discrimination in Dade County is overwhelming and the resulting need for remedial

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[9] Nothing in this Court's decision in Firefighters Local Union No. 1784 v. Stotts, ___ U.S. ___ (Nos. 82-206 & 82-229) (June 12, 1984) is relevant to the issues in this case. The Court expressly disclaimed any attempt to state limits on the authority of a municipal government to engage in affirmative action. Opinion of the Court at 20.

action is severe. Race-neutral remedies had been tried without success. The designation of a single rapid transit station within a twenty-station project, constituting less than 1% of the county's annual contracting business, has negligible impact on the other contractors. App. at 18a-19a. The openness of the legislative process, the necessity for individual consideration and action by the County Commission on every goal or set-aside proposal, and the requirement for annual review of the need for race-conscious measures, all guarantee that the rights of the majority will not be infringed by heavy-handed bureaucrats.[10]

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[10] Petitioners' complaints concerning the absence of administrative procedures for waivers or for challenging "unjust" participation are irrelevant because each goal or set-aside is individually adopted by legislative action, and majority

(footnote continues)

Indeed, Dade County's requirement of legislative action by two-thirds vote on every individual goal or set-aside renders the procedure far more protective of majority rights than any affirmative action program previously examined by the courts.

III. THE "COMPETENCE" OF THE DADE COUNTY COMMISSION IS AN ISSUE OF STATE LAW NOT WARRANTING THIS COURT'S REVIEW.

Petitioners persist in attacking the legislative "competence" of the County Commission to adopt affirmative action measures. This argument raises no substantial federal question, and is undeserving of this Court's attention.

(footnote continued)

contractors have full opportunity to address themselves to the County Commission. As the court of appeals observed, the County Commission's determinations "adequately provided the same safeguard as a formal waiver provision." App. at 20a.

This Court's decision in Bakke makes clear that the constitutionality of a state body's racial remedial action depends on whether state law grants that body power to identify and redress discrimination. 438 U.S. at 309-10 (opinion of Powell, J.). This point of federal law is settled, and the courts below expressed no doubt on the subject. See App. at 11a; App. at 94a.

The only remaining question is petitioners' dispute with the courts over the nature of the legislative powers conferred on the County Commission under Florida law. The district court, closely acquainted with Florida law, concluded that Fla. Stat. §125.01 and the special home rule provisions of Fla. Const. Art. VIII, §6, empowered the County Commission as a duly constituted legislative body to act for the general welfare by identifying

and remedying racial discrimination in the county. App. at 93a-94a. The court of appeals agreed. App. at 11a-12a. Determining the scope of the County Commission's powers is purely an issue of state law. There is simply no reason for this Court to concern itself with this state law issue. See, e.g., Butner v. United States, 440 U.S. 48, 57-58 (1979); Bishop v. Wood, 426 U.S. 341, 345-47 (1976); Wolf v. Weinstein, 372 U.S. 633, 636 (1963).

IV. QUANTITATIVE ANALYSIS OF THE NEED FOR THE EARLINGTON HEIGHTS SET-ASIDE AND GOALS IS AN ISSUE OF FACT NOT WARRANTING THIS COURT'S REVIEW.

Petitioners dispute the evidentiary basis for the County Commission's determinations, with which both the district court and the court of appeals were in complete agreement, that Dade County blacks had been excluded from County

contracting business as a result of discrimination and that race-conscious measures were necessary to increase black participation.[11] They ask this Court to grant review in order to reverse these determinations of fact.

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[11] Petitioners misstate the record when they argue that the County Commission's findings were based solely on statistical disparities. Petition at 17-19. The record of deliberate public and private discrimination reported by the United States Commission on Civil Rights (and adopted by the County Commission) utterly refutes this notion. But their disregard for this history of discrimination goes even further when they insist that affirmative action is not justified above the 1% level represented by the proportion of black contractors already existing in the county. Petition at 22-23. Holding affirmative action down to that level would merely ensure that majority contractors continue to enjoy the advantages resulting from the county's legacy of racial discrimination. The goal of affirmative action in contracting is to increase minorities' participation in industries from which they have been excluded by discriminatory practices. See Fullilove, 448 U.S. at 513-14 (Powell, J., concurring).

These arguments are simply not worthy of the Court's attention. "[T]his Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." Rogers v. Lodge, 458 U.S. 613, 623 (1982) (upholding findings of deliberate discrimination in county's design of at-large voting system); Branti v. Finkel, 445 U.S. 507, 512 n.6 (1980); Graver Manufacturing Co. v. Linde Co., 336 U.S. 271, 275 (1949).

Petitioners' argument also constitutes a frontal attack on the findings made by Congress on the same subject and upheld by this Court in Fullilove v. Klutznick, 448 U.S. 448 (1980). The pervasiveness of past discrimination in the construction industry has necessitated imposition of minority contracting goals on the Dade County rapid transit project under the auspices of the Urban Mass Transportation

Administration and the Department of Labor. See App. at 58a.[12] Petitioners' insistence that there has been no evidence of discrimination ignores the explicit findings of the United States Congress before this Court in Fullilove as well as those of the U.S. Commission on Civil Rights and the Dade County Commission. Petitioners cannot make any showing that would justify reversing these findings.

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[12] The remedial impact of even this limited federal program in the black community has been diluted by the heavy participation of Hispanic contractors, also eligible as minority business enterprises. U.S. Comm'n on Civil Rights, Confronting Racial Isolation In Miami, 117-23 (1982). It was against this background that the County Commission found it necessary to set aside the Earlington Heights contract specifically for blacks.

CONCLUSION

For the foregoing reasons, the petition does not present any question warranting this Court's review, and the Writ of Certiorari should be denied.

Respectfully submitted,

LAURENCE S. FORDHAM
RICHARD W. BENKA
GERALD L. NEUMAN
FOLEY, HOAG & ELIOT
One Post Office Square
Boston, Massachusetts 02109
(617) 482-1390

WILLIAM L. ROBINSON
NORMAN J. CHACHKIN
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212